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A TREATISE

ON THE

**LAW OF MARRIED WOMEN
IN TEXAS**

INCLUDING

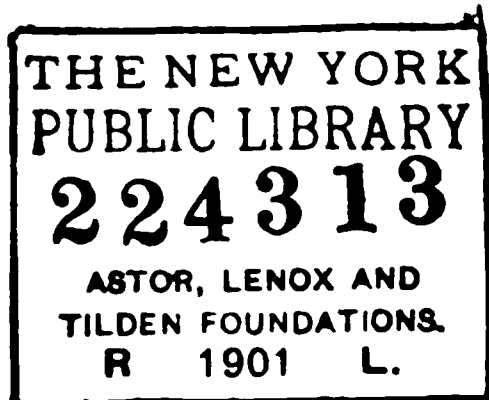
MARRIAGE, DIVORCE, HOMESTEAD, AND ADMINISTRATION.

BY

OCIE SPEER.

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DEDICATION.

**To my wife and daughters this volume
is affectionately dedicated.**

THE AUTHOR.

PREFACE.

I have endeavored to give to my brethren of the Texas bar an Exposition of the Law of Married Women, as administered by our Texas courts. Our marital system being so greatly at variance with the common law upon that subject, the need of such a work will readily suggest itself to every practitioner. The marital relations, too, being governed largely by statutes, the general works upon the subject are of little practical utility. I have undertaken, not merely to make a compilation of the various statutes affecting married women, but also to treat of the various phases of the subject as they have naturally suggested themselves, citing the decisions from all of our appellate courts. On the whole the bar has every reason to congratulate our appellate judges on the very intelligent interpretation of our statutes governing the marital rights, but at best some inconsistencies are to be found. I have not hesitated, when I deemed it proper, to invite the attention of my readers to these. Wherever an individual opinion is expressed, I am sure an intelligent profession will read it in the spirit in which I have written it,—not as critic, but in the hope of lending some aid in the search for truth. I am fully conscious of imperfection, but sincerely trust that a generous profession will receive more good than harm from what I have written.

I would be ungrateful were I to close this note without an acknowledgment of the valuable services rendered me in the preparation of this work by the timely suggestions of Ex-Chief Justice B. D. Tarlton, of Forth Worth, and of the assistance of my brother and law partner, John Speer.

OCIE SPEER.

Bowie, Texas, April 1, 1901.

TABLE OF CONTENTS.

PART I.

CHAPTER I.

MARRIAGE.

- | | |
|---|--|
| § 1. Of Marriage in General. | § 11. Indian Customs and Forms. |
| § 2. Nature of the Contract Super-inducing this Relation. | § 12. Proof of Marriage. |
| § 3. Who May Enter into. | § 13. Presumptions. |
| § 4. Who May not. | § 14. Void and Voidable. |
| § 5. Slaves. | § 15. Fraud and Duress. |
| § 6. Contractual Age in Women. | § 16. Invalid Marriages; Rights of Innocent Wife. |
| § 7. Consent of Parents. | § 17. Wife Takes Surname of Husband. |
| § 8. Solemnization. | § 18. Infant Female becomes of Full Age by Marriage. |
| § 9. Who Authorized to Celebrate Rites. | § 19. Common-Law Marriages. |
| § 10. License. | |

PART II.

WIFE'S RIGHTS, POWERS, LIABILITIES, AND DISABILITIES.

CHAPTER II.

RIGHTS AND LIABILITIES IN GENERAL.

- | | |
|---|--|
| § 20. Husband and Wife; Their Relation by Nature. | § 23. Constitutional Provisions. |
| § 21. At Common Law. | § 24. Act of 1840 Adopting the Common Law. |
| § 22. Spanish Law of Marital Rights. | § 25. Policy of Our Laws. |
| | § 26. Law Governing Prior to 1840. |

- | | |
|--|--|
| <p>§ 27. Rights of Persons Married Elsewhere.</p> <p>§ 28. Wife's Domicil.</p> <p>§ 29. Husband must Support the Wife.</p> <p>§ 30. His Authority over Her Person.</p> | <p>§ 31. When He has Abandoned Her or is Insane.</p> <p>§ 32. Married Women as Agents, Trustees, etc.</p> <p>§ 33. Suffrage; Holding Public Office.</p> <p>§ 34. Conflict of Laws Generally.</p> |
|--|--|

CHAPTER III.

HUSBAND AS WIFE'S AGENT.

- | | |
|---|---|
| <p>§ 35. In General.</p> <p>§ 36. To Manage Her Separate Property.</p> <p>§ 37. To Charge or Convey Her Separate Property.</p> <p>§ 38. His Liability for Any Conversion of Her Property.</p> | <p>§ 39. His Authority to Sign Her Name.</p> <p>§ 40. To Manage Her Business.</p> <p>§ 41. Her Power of Attorney to Him.</p> <p>§ 42. How Far Wife Bound; Ratification.</p> |
|---|---|

CHAPTER IV.

WIFE'S CONTRACTS.

- | | |
|---|---|
| <p>§ 43. At Common Law.</p> <p>§ 44. Prior to the Act of 1840.</p> <p>§ 45. Statutes; Their Scope and Object.</p> <p>§ 46. Cannot Bind Herself Generally.</p> <p>§ 47. Presumptions from Her Name Appearing on Paper.</p> <p>§ 48. Undue Influence of Her Husband.</p> <p>§ 49. Contracts with Her Husband.</p> <p>§ 50. Can Bind her Husband, When.</p> <p>§ 51. — for Necessaries for Herself and Children.</p> <p>§ 52. — the Rule Stated by Parsons.</p> <p>§ 53. — by Chief Justice Hemphill.</p> <p>§ 54. What are Necessaries; Illustrations.</p> <p>§ 55. When Credit Extended to the Wife.</p> | <p>§ 56. Can Bind Herself for Necessaries.</p> <p>§ 57. But Debt should be Contracted Personally.</p> <p>§ 58. Necessaries for Husband.</p> <p>§ 59. Her Estate Liable, When.</p> <p>§ 60. Concerning Her Separate Estate.</p> <p>§ 61. — whether Husband Liable upon Such Contracts.</p> <p>§ 62. May Transfer Her Notes.</p> <p>§ 63. May Release Her Cause of Action.</p> <p>§ 64. May Make Partition Deeds.</p> <p>§ 65. Concerning Boundary Lines of Her Property.</p> <p>§ 66. May Employ Counsel.</p> <p>§ 67. As Agent of Her Husband.</p> <p>§ 68. Her Warranty.</p> <p>§ 69. For Acquisition of Land.</p> |
|---|---|

- | | |
|--|--|
| <p>§ 70. Her Liability for Unpaid Purchase Money.</p> <p>§ 71. Her Right to Rescind; Recovery Back.</p> <p>§ 72. — Returning Benefits.</p> <p>§ 73. Her Contracts of Insurance.</p> <p>§ 74. For Sale of Land.</p> | <p>§ 75. Of Suretyship.</p> <p>§ 76. — Bonds.</p> <p>§ 77. As Stockholder in Certain Corporations.</p> <p>§ 78. May Dedicate Property to Public Use.</p> |
|--|--|

CHAPTER V.

GIFTS AND CONVEYANCES BETWEEN HUSBAND AND WIFE.

- | | |
|--|--|
| <p>§ 79. In General; Common Law; Spanish Law.</p> <p>§ 80. Of the Community Property.</p> <p>§ 81. Deed without Consideration; Gift.</p> <p>§ 82. Husband's Deed to Wife; Presumptions; Delivery.</p> <p>§ 83. Verbal Sale or Gift between.</p> <p>• § 84. — Evidence Necessary to Establish.</p> <p>§ 85. Intention; Husband's Declarations as Evidence of.</p> | <p>§ 86. Wife's Conveyance to Trustee for Husband.</p> <p>§ 87. Her Deed to Her Husband.</p> <p>§ 88. Wife as a Creditor of Husband.</p> <p>§ 89. — His Mortgage to Secure Her.</p> <p>§ 90. — Insolvent Husband Paying Wife.</p> <p>§ 91. Separation Deeds.</p> <p>§ 92. Depositing Money in Wife's Name.</p> <p>§ 93. Creditors.</p> |
|--|--|

CHAPTER VI.

WIFE'S CONVEYANCES.

- | | |
|--|--|
| <p>§ 94. Under Early Laws.</p> <p>§ 95. Act of 1841 Prescribing Mode.</p> <p>§ 96. Act of April 30, 1846.</p> <p>§ 97. Revision of 1879; Present Statute.</p> <p>§ 98. Scope and Object of Statutes.</p> <p>§ 99. She May Convey to Any Use.</p> <p>§ 100. The Deed; Its Form.</p> <p>§ 101. Joinder of the Husband.</p> <p>§ 102. — When Husband is Not Sui Juris.</p> <p>§ 103. — When Husband is Insane.</p> <p>§ 104. — Further of the Community Property.</p> | <p>§ 105. -- When Husband has Deserted Her.</p> <p>§ 106. — Her Deeds for Certain Corporation Purposes.</p> <p>§ 107. The Privy Examination.</p> <p>§ 108. Certificate of Officer.</p> <p>§ 109. — Seal.</p> <p>§ 110. Defective Certificate; Correction.</p> <p>§ 111. Who Authorized to Take; Disqualification.</p> <p>§ 112. Defective Deeds; Rights of Innocent Persons.</p> |
|--|--|

- | | |
|--|--|
| <p>§ 113. Avoiding Conveyance; How and When.</p> <p>§ 114. — for Fraud and Duress.</p> <p>§ 115. Subjects of Her Conveyance; Separate Property.</p> <p>§ 116. — Community Property.</p> <p>§ 117. — the Homestead.</p> <p>§ 118. — Her Personal Property.</p> <p>§ 119. Wife's Signing Deed to Which She is Not a Party Grantor.</p> | <p>§ 120. Special Instruments; Her Power of Attorney.</p> <p>§ 121. — Contracts to Sell and Title Bonds.</p> <p>§ 122. — Further of the Homestead.</p> <p>§ 123. — Her Mortgage.</p> <p>§ 124. — Mechanic's and Other Liens for Improvements.</p> <p>§ 125. Extent of Estate Conveyed; After-Acquired Title.</p> |
|--|--|

CHAPTER VII.

ESTOPPEL.

- | | |
|---|--|
| <p>§ 126. Generally.</p> <p>§ 127. Equitable Estoppel.</p> <p>§ 128. — Fraud.</p> <p>§ 129. — Illustrations.</p> <p>§ 130. By Silence, Delay, or Laches.</p> <p>§ 131. Accepting Benefits.</p> <p>§ 132. By Pleading; Application to Court to Sell.</p> <p>§ 133. Further of Her Declarations and Admissions.</p> | <p>§ 134. Acts and Declarations of Her Husband.</p> <p>§ 135. — Concerning Community Property.</p> <p>§ 136. By Deed.</p> <p>§ 137. By Election.</p> <p>§ 138. By Inventory as Administratrix, etc.</p> <p>§ 139. By Judgment.</p> |
|---|--|

CHAPTER VIII.

WIFE AS A MERCHANT.

- | | |
|--|---|
| <p>§ 140. As a Sole Trader.</p> <p>§ 141. As a Partner.</p> <p>§ 142. Purchases on Credit.</p> <p>§ 143. — and with Borrowed Money.</p> <p>§ 144. Profits.</p> | <p>§ 145. Her True Relation to the Attempted Business.</p> <p>§ 146. Presumptions; Burden of Proof.</p> |
|--|---|

CHAPTER IX.

TRANSACTIONS IN FRAUD OF WIFE.

- | | |
|--|---|
| <p>§ 147. Sale of Community Property by Husband; When.</p> <p>§ 148. — Statutes.</p> <p>§ 149. Bona Fide Purchasers.</p> <p>§ 150. Further of Fraud; Her Remedy.</p> | <p>§ 151. Concerning Her Separate Property.</p> <p>§ 152. Ratification by Wife.</p> |
|--|---|

CHAPTER X.

TORTS AND CRIMES.

- | | |
|--|--|
| <p>§ 153. Wife's Torts Generally.</p> <p>§ 154. Her Liability for the Torts of Her Agents.</p> | <p>§ 155. Husband's Torts Committed against the Wife.</p> <p>§ 156. Wife's Crimes.</p> |
|--|--|

CHAPTER XI.

WILLS.

- | | |
|---|---|
| <p>§ 157. At Common Law.</p> <p>§ 158. Statutes.</p> <p>§ 159. Property That may be Willed.</p> <p>§ 160. Construction; Illustrations: Cases.</p> | <p>§ 161. Husband and Wife's Joint Will.</p> <p>§ 162. Husband's Will; Election by Wife.</p> <p>§ 163. How Revoked.</p> |
|---|---|

CHAPTER XII.

GUARDIANSHIPS.

- | | |
|--|---|
| <p>§ 164. Married Women's Power to Act as Guardians.</p> <p>§ 165. — of the Persons and Estates of Minor Children.</p> | <p>§ 166. Of Insane or Habitual Drunkard, Husband or Wife.</p> <p>§ 167. Support and Maintenance of Ward.</p> |
|--|---|

PART III.

PROPERTY.

CHAPTER XIII.

COMMUNITY PROPERTY.

- | | |
|---|---|
| <p>§ 168. Spanish Civil Law.</p> <p>§ 169. Act of 1840.</p> <p>§ 170. Act of 1848; Present Statutes.</p> <p>§ 171. Nature of Wife's Interest.</p> | <p>§ 172. Mere Agreements Cannot Change.</p> <p>§ 173. Nor Subsequent Legislative Acts.</p> <p>§ 174. Her Interest not Alienable.</p> |
|---|---|

- | | |
|--|--|
| <p>§ 175. Her Title, Whether Legal or Equitable.</p> <p>§ 176. Extent of Her Interest in.</p> <p>§ 177. — Living Apart.</p> <p>§ 178. In Cases of Meretricious Unions.</p> <p>§ 179. Presumptions.</p> <p>§ 180. -- Deed Taken in Wife's Name.</p> <p>§ 181. — Comment.</p> <p>§ 182. — How Rebutted; Burden of Proof.</p> <p>§ 183. — Insufficient Proof; Instances.</p> <p>§ 184. Further Definition; Includes What.</p> <p>§ 185. — Increase of Wife's Property.</p> <p>§ 186. — Her Personal Earnings.</p> <p>§ 187. — Crops Grown upon Her Land.</p> <p>§ 188. — Rents and Hire of Her Separate Property.</p> <p>§ 189. — Timber, Soil, etc., Taken from Her Land.</p> <p>§ 190. — Profits from her Investments.</p> <p>§ 191. — Interest on Her Money.</p> <p>§ 192. — Property Purchased on Credit, When.</p> | <p>§ 193. — Damages for Injury to Person of Either Spouse.</p> <p>§ 194. — Damages to Community Property.</p> <p>§ 195. — Insurance Policy upon Life of Husband or Wife, When.</p> <p>§ 196. — Penalties, etc., under the Statute.</p> <p>§ 197. — Property Acquired by Limitation.</p> <p>§ 198. — Colonial Grants to Families.</p> <p>§ 199. — Pre-emption Homesteads.</p> <p>§ 200. — Bounty Warrants and Land Certificates.</p> <p>§ 201. Changes and Mutations.</p> <p>§ 202. Liability of Community for Community Debts.</p> <p>§ 203. For Antenuptial Debts of Spouses.</p> <p>§ 204. For Individual Debts Contracted during Marriage.</p> <p>§ 205. Community Entitled to Reimbursement, When.</p> <p>§ 206. And must Reimburse, When.</p> <p>§ 207. Sales, Conveyances, and Encumbrances.</p> <p>§ 208. Conflict of Laws.</p> |
|--|--|

CHAPTER XIV.

SEPARATE PROPERTY.

- | | |
|--|--|
| <p>§ 209. Statutory Definition.</p> <p>§ 210. Her Right to Hold Generally.</p> <p>§ 211. Registration of Her Separate Property; Statutes.</p> <p>§ 212. Effect of Failure to Register Schedule.</p> <p>§ 213. Registry of Her Muniments of Title.</p> <p>§ 214. What is Separate Property; Generally.</p> <p>§ 215. Property Owned or Claimed before Marriage.</p> | <p>§ 216. Property Acquired after Marriage by Gift.</p> <p>§ 217. — by Gift from Her Husband.</p> <p>§ 218. — by Husband, of Future Acquisitions.</p> <p>§ 219. — Her Personal Earnings.</p> <p>§ 220. Property Acquired after Marriage by Devise or Descent.</p> <p>§ 221. "Increase of Her Lands."</p> <p>§ 222. Slaves under Former Laws.</p> |
|--|--|

§ 223. Purchases with Proceeds of Separate Property.	§ 229. Damages to the Wife's Separate Property.
§ 224. Property Taken in Discharge of Debt Due the Wife.	§ 230. Value of the Use of the Wife's Property when Unlawfully Detained by Another.
§ 225. Rents and Profits from Trust Estate.	§ 231. Mutations.
§ 226. Proceeds of Her Land Adjudged by Court for Her Support.	§ 232. Presumptions of Community; Burden of Overcoming.
§ 227. Life Insurance Policy in Wife's Favor.	§ 233. Innocent Purchasers of Her Property.
§ 228. Property Purchased by the Wife on Credit.	§ 234. Liability and Charges.
	§ 235. Conflict of Laws.

CHAPTER XV.

TRUSTS.

§ 236. Generally; Definition.	§ 240. — Notice by Recitals in Deed.
§ 237. Trusts for Married Women.	§ 241. — Evidence of; Parol.
§ 238. In Contemplation of Marriage.	§ 242. — Quantum of Proof Required.
§ 239. Resulting Trusts.	

CHAPTER XVI.

HOMESTEAD AND OTHER EXEMPTIONS.

§ 243. Constitutional Provisions.	§ 254. — Things Affixed to the Realty.
§ 244. Statutes; Their Scope and Object.	§ 255. — Issues, Rents, and Damages.
§ 245. Nature of Her Interest.	§ 256. The Right to Select.
§ 246. What is Homestead; Residence.	§ 257. Designating Homestead; Statute.
§ 247. — Dedication.	§ 258. Sale, Generally.
§ 248. — Further of Intention.	§ 259. Sale by Husband; Adjusting Equities.
§ 249. — in Separate Tracts or Lots.	§ 260. — for Roads, Streets, etc.
§ 250. — Whether Rural or Urban.	§ 261. Contracts of Wife to Sell.
§ 251. — and Further of the Limitations as to Quantity and Value.	§ 262. Cannot be Mortgaged.
§ 252. — the Estate to Support.	§ 263. Mechanics' Liens.
§ 253. — Business Homestead.	§ 264. Other Liens for Improvements.

§ 265. Purchase Money.	§ 269. Proceeds of Insurance on.
§ 266. "Other Liens."	§ 270. Abandonment of Homestead.
§ 267. Taxes Due upon the Homestead.	§ 271. — If in Fraud of the Wife.
§ 268. Proceeds of Voluntary Sale Exempt, When.	§ 272. Husband and Wife Living Apart.
	§ 273. Miscellaneous Exemptions.

CHAPTER XVII.

MARRIAGE SETTLEMENTS.

§ 274. Statute.	§ 277. Fraud.
§ 275. Record of Contract.	§ 278. Postnuptial Contracts.
§ 276. Construction; Intention.	§ 279. Conflict of Laws.

PART IV.

ACTIONS.

CHAPTER XVIII.

RIGHT OF, BY, AND AGAINST, GENERALLY.

§ 280. Right to Appear in the Courts as Party Litigant.	§ 282. — Instances.
§ 281. May Appear in Her Own Name.	§ 283. — Suing Her Husband.

CHAPTER XIX.

PARTIES.

§ 284. Wife as a Plaintiff.	§ 288. — by Parent for Injuries Resulting in Death of Child; Statute.
§ 285. Her Suits Instituted before Marriage.	§ 289. — for Penalties and Forfeitures under the Statute.
§ 286. Husband should be a Party Plaintiff, When.	§ 290. Actions Concerning the Homestead.
§ 287. Actions Concerning Community Property.	

§ 291. Actions for Alienating Husband's Affections.	§ 296. Husband a Necessary Defendant with Her.
§ 292. When Husband is Insane.	§ 297. She is not a Necessary Defendant, When.
§ 293. Wife as a Defendant.	
§ 294. When She may be Sued.	
§ 295. — Concerning the Homestead.	

CHAPTER XX.

PLEADINGS.

§ 298. Wife must Allege Grounds Entitling Her to Sue.	§ 300. Facts Showing Her Liability must be Plead.
§ 299. Actions by Husband in Behalf of Wife.	§ 301. Coverture as a Defense.

CHAPTER XXI.

EVIDENCE; WIFE AS WITNESS.

§ 302. When Common-Law Rule Obtained.	§ 305. In Criminal Cases.
§ 303. Present Rule; Statute.	§ 306. — Parties Not Lawfully Married.
§ 304. — Transactions with Deceased Spouse.	§ 307. Declarations of Husband and Wife.

CHAPTER XXII.

LIMITATIONS.

§ 308. Act of 1841; Constitution of 1869.	§ 312. Wife may Claim Benefit of Statute of Limitations.
§ 309. Amendment of 1895.	§ 313. Tacking Disabilities.
§ 310. When and in What Cases the Statute Runs.	§ 314. Husband Pleading Limitation against the Wife.
§ 311. Extent of Coverture as an Exemption; must be Plead.	

CHAPTER XXIII.

JUDGMENT AND EXECUTION.

- | | |
|--|---|
| <p>§ 315. Validity of General Judgment
against Married Woman.</p> <p>§ 316. — Contrary Holdings.</p> <p>§ 317. — Comment.</p> <p>§ 318. Default Judgments; Errone-
ous Judgments.</p> <p>§ 319. Collateral Attack.</p> | <p>§ 320. Judgment where She is Not
Personally Liable; Costs.</p> <p>§ 321. When Judgment against Hus-
band Binds Her.</p> <p>§ 322. Her Confession of Judgment.</p> <p>§ 323. Execution.</p> |
|--|---|

PART V.

DISSOLUTION OF MARRIAGE.

CHAPTER XXIV.

METHODS AND RESULTS GENERALLY.

- | | |
|--|---|
| <p>§ 324. Dissolution Terminates Sta-
tus and Community.</p> <p>§ 325. Effect of, on Pending Suits</p> | <p>and Choses in Action Gen-
erally.</p> <p>§ 326. Presumptions as to Property.</p> |
|--|---|

CHAPTER XXV.

DIVORCE GENERALLY; JURISDICTION AND GROUNDS.

- | | |
|---|--|
| <p>§ 327. Prefatory to Discussion.</p> <p>§ 328. Early Divorces and Divorce
Laws.</p> <p>§ 329. Present Statute; Jurisdiction.</p> <p>§ 330. Impediments Rendering Con-
tract Void.</p> <p>§ 331. — Wife Enceinte at Mar-
riage.</p> <p>§ 332. — Marriage Procured by
Fraud or Duress.</p> <p>§ 333. Cruelty, Excesses, and Out-
rages.</p> | <p>§ 334. — Affecting the Mind.</p> <p>§ 335. Abandonment.</p> <p>§ 336. Adultery.</p> <p>§ 337. Imprisonment for Felony.</p> <p>§ 338. Drunkenness, Insanity, Re-
ligious Beliefs, etc.</p> <p>§ 339. Causes Arising Outside of
State.</p> <p>§ 340. Conveyances of Property Pen-
dente Lite.</p> |
|---|--|

CHAPTER XXVI.

DIVORCE; PLEADINGS, DEFENSES, AND EVIDENCE.

- | | |
|--|---|
| <p>§ 341. The Petition.</p> <p>§ 342. The Citation.</p> <p>§ 343. The Answer.</p> <p>§ 344. Presumptions.</p> <p>§ 345. Recrimination.</p> <p>§ 346. Condonation.</p> <p>§ 347. Quantum of Proof Required.</p> | <p>§ 348. — Illustrations; Cases.</p> <p>§ 349. Parties as Witnesses; Their Admissions and Statements.</p> <p>§ 350. Collusion of Parties; Their Agreements, etc.</p> <p>§ 351. Testimony of <i>Particeps Criminis</i>.</p> |
|--|---|

CHAPTER XXVII.

DIVORCE; THE DECREE, ITS SCOPE, EFFECT, AND FINALITY.

- | | |
|--|---|
| <p>§ 352. Is from Bonds of Matrimony, Generally.</p> <p>§ 353. Should Settle Property Rights.</p> <p>§ 354. — Community Property and Debts.</p> <p>§ 355. — Homestead.</p> <p>§ 356. Devesting Title to Real Estate.</p> | <p>§ 357. Alimony.</p> <p>§ 358. Costs.</p> <p>§ 359. Custody of Children.</p> <p>§ 360. — Conclusiveness of Award.</p> <p>§ 361. Finality of Divorce Decrees, Generally.</p> <p>§ 362. Decrees of Other Jurisdictions.</p> |
|--|---|

CHAPTER XXVIII.

DEATH OF HUSBAND OR WIFE.

- | | |
|--|---------------------------------------|
| <p>§ 363. Descent of Property; Statute.</p> <p>§ 364. — Further of the Community Property.</p> | <p>§ 365. — and of the Homestead.</p> |
|--|---------------------------------------|

CHAPTER XXIX.

SAME CONTINUED; ADMINISTRATION.

- | | |
|---|--|
| <p>§ 366. Administration Generally; Statute.</p> <p>§ 367. Allowance to Widow and Minor Children; Statute.</p> <p>§ 368. — the Order.</p> | <p>§ 369. — Persons Entitled to, and When.</p> <p>§ 370. — Taking Property in Payment.</p> |
|---|--|

- | | |
|---|--|
| <p>§ 371. Setting Apart Homestead and Other Exempt Property; Allowance in Lieu; Statutes.</p> <p>§ 372. — Nature and Extent of These Rights.</p> <p>§ 373. — Further of the Homestead and Allowance in Lieu thereof.</p> <p>§ 374. Same Subject Continued.</p> <p>§ 375. Administration of Community Property; Statutes.</p> <p>§ 376. — Nature of Survivor's Holding.</p> <p>§ 377. — Paying Community Debts.</p> <p>§ 378. — Sales by Survivor.</p> | <p>§ 379. — Exemptions.</p> <p>§ 380. — What, then, are Assets of the Estate?</p> <p>§ 381. — Power of Survivor to Sell the Homestead.</p> <p>§ 382. Liens.</p> <p>§ 383. Suits By and Against Survivor.</p> <p>§ 384. Individual Liability of Survivor and Suits on Bond.</p> <p>§ 385. Defective and Irregular Proceedings.</p> <p>§ 386. Joint Administrations.</p> <p>§ 387. Closing up of Community Administration; Distribution.</p> |
|---|--|

CHAPTER XXX.

SAME CONCLUDED; RIGHTS AND LIABILITIES OF SURVIVOR WITHOUT ADMINISTRATION.

- | | |
|--|---|
| <p>§ 388. When a Community Administration is Unnecessary.</p> <p>§ 389. The Relation of the Survivor to the Estate; Nature of His Holding.</p> <p>§ 390. Comparative Rights of Deceased's Administrator and Survivor.</p> <p>§ 391. Partition of Community Property from Estate of Deceased; Statute.</p> <p>§ 392. Sales, Conveyances, and Encumbrances by Survivor.</p> <p>§ 393. — Burden of Proof to Show Authority; Presumptions.</p> | <p>§ 394. Carrying out Contracts Entered into during Marriage.</p> <p>§ 395. Purchasers from Survivor; Equities.</p> <p>§ 396. Sales and Other Transactions Concerning Separate Property.</p> <p>§ 397. Equities between Survivor and Children.</p> <p>§ 398. Suits By and Against Survivor.</p> <p>§ 399. The Same Subject.</p> <p>§ 400. Remarriage of Widow.</p> |
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TABLE OF CASES CITED.

A.

- Abney v. Pope, 52 Tex. 288, § 382.
Achilles v. Willis, 81 Tex. 169, 16 S. W. 746, § 249.
Adams v. Kaufman, 11 Tex. Civ. App. 179, 32 S. W. 712, § 247.
Adams v. Pardue (Tex. Civ. App.) 36 S. W. 1015, § 108.
Adamson v. Shiel, 4 Tex. App. Civ. Cas. (Willson) § 294, 18 S. W. 464, § 37.
Affleck v. Wangermann, 93 Tex. 351, 55 S. W. 312, § 257.
Agricultural, Mechanical, & Blood-Stock Asso. v. Brewster, 51 Tex. 257, § 243.
Akin v. Jefferson, 65 Tex. 137, §§ 389, 392.
Albrecht v. Albrecht (Tex. Civ. App.) 35 S. W. 1076, §§ 182, 183, 232.
Alexander v. Holt, 59 Tex. 205, § 254.
Alexander v. Lovitt (Tex. Civ. App.) 56 S. W. 685, § 270.
Allen v. Bright (Tex. Civ. App.) 23 S. W. 712, §§ 392, 395.
Allen v. Garrison, 92 Tex. 546, 50 S. W. 335, 48 S. W. 554, § 42.
Allen v. Urquhart, 19 Tex. 481, §§ 94, 101.
Allen v. Whitaker (Tex. Civ. App.) 27 S. W. 507, §§ 248-250.
Allison v. Shilling, 27 Tex. 450, § 394.
Alsup v. Jordan, 69 Tex. 300, 6 S. W. 831, § 311.
American Exp. Co. v. Lankford (Ind. Terr.) 39 S. W. 817, § 35.
Ames v. Hubby, 49 Tex. 705, § 200.
Anderson v. McKay, 30 Tex. 186, § 247.
Anderson v. Sessions (Tex. Civ. App.) 51 S. W. 874, § 249.
Anderson v. Waco State Bank, 92 Tex. 506, 49 S. W. 1030, § 233.
Andrews v. Andrews, 1 Dallam (Tex.) 375, § 357.
Andrews v. Andrews, 75 Tex. 609, 12 S. W. 1124, § 341.
Andrews v. Bonham, 19 Tex. Civ. App. 179, 46 S. W. 902, § 107.
Andrews v. Union Cent. L. Ins. Co. (Tex. Civ. App.) 44 S. W. 610, §§ 372, 373.
Andrus v. Randon, 34 Tex. 536, § 91.
Angel v. Miller, 16 Tex. Civ. App. 679, 39 S. W. 1092, § 75.
Angier v. Coward, 79 Tex. 551, 15 S. W. 698, §§ 74, 121, 122.
M. W.—b.

- Anheuser-Busch Brewing Asso. v. Smith (Tex. Civ. App.) 26 S. W. 94, § 252.
- Ann Berta Lodge, No. 42, I. O. O. F. v. Levertton, 42 Tex. 18, § 105.
- Ansley v. Baker, 14 Tex. 607, § 399.
- Archenhold v. B. C. Evans Co. 11 Tex. Civ. App. 138, 32 S. W. 795, § 259.
- Archibald v. Jacobs, 69 Tex. 248, 6 S. W. 177, § 248.
- Arnold v. Attaway (Tex. Civ. App.) 35 S. W. 482, 89 Tex. 506, 35 S. W. 646, §§ 64, 118.
- Arnold v. Cauble, 49 Tex. 527, § 397.
- Arnold v. Dean, 61 Tex. 253, § 363.
- Arnold v. Hodge, 20 Tex. Civ. App. 211, 49 S. W. 714, §§ 175, 364.
- Arnold v. Macdonald, 22 Tex. Civ. App. 487, 55 S. W. 529, § 259.
- Arto v. Maydole, 54 Tex. 244, § 249.
- Ashe v. Yungst, 65 Tex. 631, §§ 381, 392.
- Ashley v. Rockwell, 43 Ohio St. 386, 2 N. E. 437, § 311.
- Atkinson v. Phares, 20 Tex. Civ. App. 150, 49 S. W. 653, §§ 250, 253.
- Auerbach v. Wylie, 84 Tex. 619, 19 S. W. 856, 20 S. W. 776, §§ 393, 400.
- Augustine v. State (Tex. Crim. App.) 23 S. W. 794, §§ 179, 180.
- Aultman v. Allen, 12 Tex. Civ. App. 227, 33 S. W. 679, § 270.
- Aultman v. George, 12 Tex. Civ. App. 457, 34 S. W. 652, § 223.
- Austin v. Emanuel, 74 Tex. 621, 12 S. W. 318, § 299.
- Avery v. Avery, 12 Tex. 54, § 217.
- Avery v. Popper (Tex. Civ. App.) 45 S. W. 951, § 116.
- Axer v. Bassett, 63 Tex. 545, § 249.
- Aycock v. Kimbrough, 71 Tex. 330, 12 S. W. 71, § 64.
- Ayers v. Fellrath, 5 Tex. Civ. App. 557, 24 S. W. 347, § 134.
- Ayers v. Lamb (Tex. Civ. App.) 40 S. W. 1024, § 250.
- Ayres v. Shackey, 2 Posey Unrep. Cas. (Tex.) 274, § 270.

B.

- Babb v. Carroll, 21 Tex. 765, §§ 28, 198.
- Bahn v. Bahn, 62 Tex. 518, § 334.
- Bahn v. Starcke, 89 Tex. 203, 34 S. W. 103, § 355.
- Bailey v. Bauknight (Tex. Civ. App.) 25 S. W. 56, § 270.
- Bailey v. Harris, 19 Tex. 109, § 241.
- Bailey v. Hicks, 16 Tex. 222, § 57.
- Baily v. Trammell, 27 Tex. 328, § 107.
- Baird v. Patillo (Tex. Civ. App.) 24 S. W. 813, § 68.
- Baker v. Collins, 4 Tex. Civ. App. 520, 23 S. W. 493, § 259.
- Baker v. Young, 44 Ill. 42, § 153.
- Baldeschweiler v. Ship, 21 Tex. Civ. App. 80, 50 S. W. 644, § 249.
- Ball v. Bennett, 21 Ind. 427, § 153.
- Ball v. Lowell, 56 Tex. 579, § 373.
- Ballard v. McMillan, 5 Tex. Civ. App. 679, 25 S. W. 327, § 309.
- Ballard v. Perry, 28 Tex. 347, § 109.
- Ballew v. Casey (Tex.) 9 S. W. 189, § 201.

- Bank of United States v. Lee, 13 Pet. 107, 10 L. ed. 81, § 213.
Banks v. House (Tex. Civ. App.) 50 S. W. 1022, § 263.
Barker v. Wilson, 4 Heisk. 268, § 102.
Barnes v. White, 53 Tex. 628, § 247.
Barnett v. Murray, 54 S. W. 784, § 69.
Bartlett v. Cocke, 15 Tex. 471, § 286.
Bartoli v. Huguenard, 39 La. Ann. 416, 2 So. 196, 6 So. 30, § 184.
Barziza v. Graves, 25 Tex. 322, § 84.
Bass v. Davis (Tex. Civ. App.) 38 S. W. 268, § 397.
Bassett v. Martin, 83 Tex. 339, 18 S. W. 587, § 207.
Bateman v. Bateman, 25 Tex. 270, §§ 169, 185.
Bateman v. Pool, 84 Tex. 405, 19 S. W. 552, § 262.
Batla v. Batla (Tex. Civ. App.) 51 S. W. 664, § 91.
Batte v. Beck, 70 Tex. 754, 8 S. W. 544, § 232.
Baum v. Williams, 16 Tex. Civ. App. 407, 41 S. W. 840, § 270.
Baxter v. Dear, 24 Tex. 17, §§ 280, 310.
Baxter v. State, 34 Tex. Crim. Rep. 516, 31 S. W. 394, § 305.
Baylor v. Hopf, 81 Tex. 637, 17 S. W. 230, § 243.
Beall v. Hollingsworth (Tex. Civ. App.) 46 S. W. 881, § 365.
Bean v. Brownwood (Tex. Civ. App.) 43 S. W. 1036, § 267.
Bean v. Galveston (Tex. Civ. App.) 43 S. W. 1036, § 295.
Beattie v. Keller (Tex. Civ. App.) 49 S. W. 408, §§ 75, 112, 312.
Beck v. Beck, 63 Tex. 34, § 345.
Beitel v. Wagner, 11 Tex. Civ. App. 365, 32 S. W. 366, § 108.
Belcher v. Weaver, 46 Tex. 294, § 108.
Bell v. Greathouse, 20 Tex. Civ. App. 478, 49 S. W. 258, §§ 247, 270.
Bell v. Read (Tex. Civ. App.) 56 S. W. 584, § 374.
Bell v. Schwarz, 56 Tex. 353, § 381.
Belt v. Raguet, 27 Tex. 471, § 93.
Belyew v. Belyew (Tex. Civ. App.) 32 S. W. 40, § 347.
Bennett v. Gillett (Tex. Civ. App.) 57 S. W. 302, §§ 287, 298.
Bennett v. Montgomery, 3 Tex. Civ. App. 222, 22 S. W. 115, § 105.
Bennett v. Virginia Ranch, Land, & Cattle Co. 1 Tex. Civ. App. 321, 21 S. W. 126, § 118.
Bente v. Lange, 9 Tex. Civ. App. 328, 29 S. W. 813, § 248.
Berg v. Ingalls, 79 Tex. 522, 15 S. W. 579, § 340.
Bergstroem v. State, 58 Tex. 92, § 384.
Berry v. Donley, 26 Tex. 737, §§ 72, 107, 112, 128, 131.
Berry v. Wright, 14 Tex. 270, § 116.
Besch v. Besch, 27 Tex. 390, §§ 335, 341.
Best v. Nix, 6 Tex. Civ. App. 349, 25 S. W. 130, § 313.
Betts v. Simons (Tex. Civ. App.) 35 S. W. 50, § 64.
Beville v. Jones, 74 Tex. 148, 11 S. W. 1128, § 108.
Bexar Bldg. & Loan Asso. v. Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583, §§ 54, 111.
Bicocchi v. Casey-Swasey Co. 91 Tex. 259, 42 S. W. 963, § 148.
Billington v. Hammond, 3 Tex. App. Civ. Cas. (Willson) § 295, § 50.

- Bishop v. Lusk, 8 Tex. Civ. App. 30, 27 S. W. 306, § 197.
Black v. Black, 62 Tex. 296, § 284.
Black v. Bryan, 18 Tex. 453, 464, §§ 29, 51, 53, 55.
Black v. Rockmore, 50 Tex. 88, §§ 378, 382.
Blackburn v. Knight, 81 Tex. 326, 16 S. W. 1075, § 270.
Blagge v. Moore, 6 Tex. Civ. App. 359, 23 S. W. 466, 26 S. W. 305, §§ 128, 131, 132.
Blagge v. Shaw (Tex. Civ. App.) 41 S. W. 756, § 293.
Blair v. Finlay, 75 Tex. 210, 12 S. W. 983, § 134.
Blair v. Thorp, 33 Tex. 38, § 382.
Blanchet v. Dugat, 5 Tex. 507, §§ 67, 105.
Blankenship v. Douglas, 26 Tex. 225, § 239.
Blessing v. Galveston, 42 Tex. 641, § 250.
Blethen v. Bonner (Tex. Civ. App.) 52 S. W. 571, §§ 34, 208.
Blinn v. McDonald, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931, § 363.
Blum v. Light, 81 Tex. 414, 16 S. W. 1090, §§ 185, 217, 228, 230.
Blum v. Rogers, 71 Tex. 668, 9 S. W. 595, §§ 205, 239.
Blum v. Rogers, 78 Tex. 530, 15 S. W. 115, § 249.
Bluman v. State, 33 Tex. Crim. Rep. 43, 21 S. W. 1027, S. C. 26 S. W. 75, § 305.
Boehm v. Beutler, 16 Tex. Civ. App. 380, 41 S. W. 658, § 207.
Bohan v. Bohan (Tex. Civ. App.) 56 S. W. 959, §§ 193, 345, 354.
Bohannon v. Pearson, 2 Tex. App. Civ. Cas. (Willson) § 622, § 50.
Bomback v. Sykes, 24 Tex. 217, § 262.
Bond v. Hill, 37 Tex. 626, § 205.
Bonnell v. Prince, 11 Tex. Civ. App. 399, 32 S. W. 855, § 384.
Boone v. Hulsey, 71 Tex. 176, 9 S. W. 531, § 198.
Booth v. Cotton, 13 Tex. 359, §§ 45, 46, 56.
Bord v. Stubbs, 22 Tex. Civ. App. 242, 54 S. W. 633, § 66.
Bosley v. Pease (Tex. Civ. App.) 22 S. W. 516, S. C. 86 Tex. 202, 24 S. W. 279, § 263.
Bostwick v. Bostwick, 73 Tex. 182, 11 S. W. 178, § 342.
Bowles v. Smith (Tex. Civ. App.) 34 S. W. 381, §§ 310, 313.
Bowman v. Rutter (Tex. Civ. App.) 47 S. W. 52, § 129.
Bowman v. Watson, 66 Tex. 295, 1 S. W. 273, § 270.
Box v. Word, 65 Tex. 166, § 393.
Boyd v. Boyd, 22 Tex. Civ. App. 200, 54 S. W. 380, § 357.
Boyd v. Ghent (Tex. Civ. App.) 53 S. W. 704, §§ 354, 358.
Boyd v. State, 33 Tex. Crim. Rep. 470, 26 S. W. 1080, § 305.
Brackenridge v. Rice (Tex. Civ. App.) 30 S. W. 588, § 395.
Brackett v. Devine, 25 Tex. Supp. 195, § 384.
Braden v. Gose, 57 Tex. 37, § 191.
Bradford v. Johnson, 44 Tex. 381, § 141.
Bradford v. Knowles, 78 Tex. 109, 14 S. W. 307, § 139.
Bradley v. Deroche, 70 Tex. 465, 7 S. W. 779, § 272.
Bradley v. Love, 60 Tex. 472, § 216.

- Bradshaw v. Mayfield, 18 Tex. 21, §§ 79, 84.
Bramlette v. State, 21 Tex. App. 611, 2 S. W. 765, § 305.
Branch v. Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050, § 85.
Branham v. Scott (Tex. Civ. App.) 51 S. W. 38, § 276.
Breitling v. Chester, 88 Tex. 589, 32 S. W. 527, § 107.
Breneman v. Mayer (Tex. Civ. App.) 58 S. W. 725, §§ 108, 129.
Brennan v. Fuller, 14 Tex. Civ. App. 509, 37 S. W. 641, § 253.
Brewer v. Wall, 23 Tex. 585, §§ 116, 122, 261, 381, 394.
Brewster v. Davis, 56 Tex. 478, § 113.
Bridges v. Johnson, 69 Tex. 714, 7 S. W. 506, § 252.
Brooks v. Chatham, 57 Tex. 31, §§ 248, 249, 266.
Brotherton v. Weathersby, 73 Tex. 471, 11 S. W. 505, § 241.
Broussard v. Dull, 3 Tex. Civ. App. 59, 21 S. W. 937, § 108.
Brown v. Brown, 61 Tex. 45, § 311.
Brown v. Brown, 61 Tex. 56, §§ 36, 82.
Brown v. Chancellor, 61 Tex. 437, § 141.
Brown v. Ector, 19 Tex. 346, §§ 46, 57.
Brown v. Elmendorf, 87 Tex. 56, 26 S. W. 1043, § 395.
Brown v. Meador, 1 Posey Unrep. Cas. (Tex.) 281, § 308.
Brown v. Pridgen, 56 Tex. 124, § 159.
Brown v. Reed, 20 Tex. Civ. App. 74, 48 S. W. 537, § 365.
Brown v. Seaman, 65 Tex. 628, § 384.
Brown v. Wilson (Tex. Civ. App.) 29 S. W. 530, § 262.
Bruce v. Koch (Tex. Civ. App.) 40 S. W. 626, §§ 80, 218.
Bruner v. Bruner (Tex. Civ. App.) 43 S. W. 796, §§ 343, 352.
Buchanan v. Thompson, 4 Tex. Civ. App. 236, 23 S. W. 328, § 399.
Building & L. Asso. v. Griffin, 90 Tex. 486, 39 S. W. 656, § 264.
Building & L. Asso. v. Guillemet, 15 Tex. Civ. App. 649, 40 S. W. 225, § 270.
Building & L. Asso. v. Logan (Tex. Civ. App.) 33 S. W. 1088, § 264.
Bullock v. Hayter, 24 Tex. 9, § 322.
Bullock v. Sprowls (Tex. Civ. App.) 54 S. W. 657, § 205.
Burgess v. Hargrove, 64 Tex. 110, § 364.
Burgher v. Henderson, 9 Tex. Civ. App. 521, 29 S. W. 522, § 247.
Burke v. Purifoy, 21 Tex. Civ. App. 202, 50 S. W. 1089, § 297.
Burkett v. Scarborough, 59 Tex. 495, § 108.
Burkitt v. Key (Tex. Civ. App.) 42 S. W. 231, § 392.
Burleson v. Burleson, 28 Tex. 383, §§ 127, 128.
Burney v. Burney, 11 Tex. Civ. App. 174, 32 S. W. 328, §§ 334, 348.
Burnham v. McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887, §§ 217, 314.
Burns v. Falls (Tex. Civ. App.) 56 S. W. 576, §§ 372, 389.
Burr v. Wilson, 18 Tex. 368, § 102.
Burris v. Wideman, 6 Tex. 231, § 198.
Busby v. Davis, 57 Tex. 323, § 385.
Butler v. Robertson, 11 Tex. 142, §§ 60, 105.
Byars v. Byars, Tex. Civ. App. 565, 32 S. W. 925, § 184.
Byne v. Wise (Tex. Civ. App.) 31 S. W. 1069, § 310.

Byrd v. Ellis (Tex. Civ. App.) 35 S. W. 1070, § 399.
 Byrn v. Kleas, 15 Tex. Civ. App. 205, 39 S. W. 980, §§ 232, 326.
 Byrne v. Byrne, 3 Tex. 336, §§ 333, 341.

C.

Cabell v. Menczer (Tex. Civ. App.) 35 S. W. 206, §§ 191, 221, 298.
 Cadwallader v. Campbell (Tex. Civ. App.) 31 S. W. 829, § 259.
 Cadwallader v. Lovece, 10 Tex. Civ. App. 1, 29 S. W. 606, 917, § 259.
 Caffey v. Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738, §§ 91, 113, 304.
 Caffey v. Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65, § 180.
 Cage v. Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180, § 395.
 Cairrell v. Higgs, 1 Posey Unrep. Cas. (Tex.) 56, § 302.
 Caldwell v. Brown, 43 Tex. 216, § 301.
 Calhoun v. Stark, 13 Tex. Civ. App. 60, 35 S. W. 410, § 363.
 Callahan v. Houston, 78 Tex. 494, 14 S. W. 1027, § 82.
 Callahan v. Patterson, 4 Tex. 61, §§ 29, 107.
 Cameron v. Fay, 55 Tex. 58, §§ 205, 269.
 Cameron v. Gebhard, 85 Tex. 610, 22 S. W. 1033, §§ 124, 263.
 Cameron v. Marshall, 65 Tex. 7, § 263.
 Cameron v. Morris, 83 Tex. 14, 18 S. W. 422, §§ 373, 380.
 Camp v. Camp, 18 Tex. 528, §§ 335, 338.
 Campbell v. Antis, 21 Tex. Civ. App. 161, 51 S. W. 343, § 204.
 Campbell v. Crater, 95 N. C. 156, § 311.
 Campbell v. Crowley (Tex. Civ. App.) 56 S. W. 373, § 129.
 Campbell v. Elliott, 52 Tex. 151, § 295.
 Campbell v. Harris, 4 Tex. Civ. App. 636, 23 S. W. 35, § 287.
 Campbell v. McCampbell (Tex. Civ. App.) 34 S. W. 970, § 264.
 Campbell v. Macmanus, 32 Tex. 442, § 249.
 Canfield v. Moore, 16 Tex. Civ. App. 472, 41 S. W. 718, §§ 75, 184.
 Cannon v. Boutwell, 53 Tex. 626, §§ 41, 120, 172.
 Cannon v. Hemphill, 7 Tex. 184, § 286.
 Cannon v. Murphy, 31 Tex. 405, § 198.
 Carden v. Short (Tex. Civ. App.) 31 S. W. 246, § 129.
 Cardwell v. Rogers, 76 Tex. 37, 12 S. W. 1006, § 41.
 Carleton v. Goebler (Tex.) 58 S. W. 829, §§ 390, 399.
 Carleton v. Haywood, 49 N. H. 314, § 153.
 Carleton v. Roberts, 1 Posey Unrep. Cas. (Tex.) 587, § 241.
 Carlisle v. Sommer, 61 Tex. 124, §§ 191, 230.
 Carothers v. McNese, 43 Tex. 221, §§ 105, 296.
 Carr v. Tucker, 42 Tex. 330, §§ 188, 230.
 Carroll v. Carroll, 20 Tex. 732, §§ 13, 160.
 Carson v. Taylor, 19 Tex. Civ. App. 177, 47 S. W. 395, §§ 316, 319.
 Carter v. Bolin, 30 S. W. 1084, S. C. later decision, 11 Tex. Civ. App. 283,
 32 S. W. 123, §§ 228, 239.
 Carter v. Conner, 60 Tex. 52, §§ 390, 398, 399.
 Carter v. Jackson, 56 N. H. 364, § 153.

- Carter v. Kaiser** (Tenn. Ch. App.) 48 S. W. 265, § 294.
Carter v. Wise, 39 Tex. 273, § 198.
Cartwright v. Cartwright, 18 Tex. 626, §§ 168, 169, 221, 222.
Cartwright v. Hollis, 5 Tex. 152, §§ 25, 43, 49.
Cartwright v. Moore, 66 Tex. 55, 1 S. W. 263, § 304.
Caruth v. Grigsby, 57 Tex. 259, § 198.
Cason v. Laney (Tex. Civ. App.) 27 S. W. 420, §§ 31, 292.
Castro v. Illies, 22 Tex. 479, §§ 27, 279, 434.
Causici v. La Coste, 20 Tex. 269, § 200.
Cavil v. Walker, 7 Tex. Civ. App. 305, 26 S. W. 854, §§ 69, 219, 228.
Cayce v. Powell, 20 Tex. 767, §§ 280, 315, 322.
Caywood v. Henderson (Tex. Civ. App.) 44 S. W. 927, § 262.
C. B. Carter Lumber Co. v. Clay (Tex.) 10 S. W. 293, § 270.
Ceccato v. Deutschman, 19 Tex. Civ. App. 434, 47 S. W. 739, § 66.
Centennial Mut. L. Asso. v. Parham, 80 Tex. 518, 16 S. W. 316, § 73.
Central Coal & Coke Co. v. Henry (Tex. Civ. App.) 47 S. W. 281, § 295.
Central Kentucky Lunatic Asylum v. Craven, 98 Ky. 105, 32 S. W. 291, §§ 267, 272.
Cervenka v. Dyches (Tex. Civ. App.) 32 S. W. 316, § 262.
Chaison v. Beauchamp Bros. 12 Tex. Civ. App. 109, 34 S. W. 303, §§ 41, 68.
Chambers v. Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118, § 399.
Champion v. Shumate, 90 Tex. 597, 39 S. W. 128, 40 S. W. 394, § 379.
Chapman v. Allen, 15 Tex. 278, §§ 76, 179, 182, 231, 232, 284.
Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564, 88 Tex. 641, 16 Tex. Civ. App. 382, 41 S. W. 533, 32 S. W. 871, §§ 10, 19, 178, 364.
Chappell v. McIntyre, 9 Tex. 161, § 27.
Charles v. Chaney (Tex. Civ. App.) 26 S. W. 169, § 249.
Chase v. Gregg, 88 Tex. 552, 32 S. W. 520, § 162.
Chase v. Swayne, 88 Tex. 218, 30 S. W. 1049, §§ 251, 269.
Chauviere v. Fliege, 6 La. Ann. 56, § 153.
Cheek v. Bellows, 17 Tex. 613, §§ 60, 67, 105, 287.
Cheek v. Herndon, 82 Tex. 146, 17 S. W. 763, §§ 80, 397.
Chester v. Breitling (Tex. Civ. App.) 30 S. W. 464, 88 Tex. 586, 32 S. W. 527, § 101.
Chew v. State, 23 Tex. App. 230, 5 S. W. 373, § 12.
Chicago & S. W. R. Co. v. Swinney, 38 Iowa, 182, § 260.
Chicago, T. & M. C. R. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, § 260.
Chifflet v. Willis, 74 Tex. 245, 11 S. W. 1105, § 368.
Childers v. Henderson, 76 Tex. 667, 13 S. W. 481, §§ 373, 374.
Christmas v. Smith, 10 Tex. 123, § 57.
Church v. Chicago & A. R. Co. 119 Mo. 203, 23 S. W. 1056, § 285.
Citizens' Nat. Bank v. Jones, 22 Tex. Civ. App. 45, 54 S. W. 405, §§ 377, 384.
Claffin v. Pfeiffer, 76 Tex. 469, 13 S. W. 483, §§ 146, 182, 223, 224, 226, 228, 229, 231, 232.
Clapp v. Engledow, 72 Tex. 252, 10 S. W. 462, § 138.
Clardy v. Wilson (Tex. Civ. App.) 58 S. W. 52, §§ 34, 180, 201, 217, 223.

Byrd v. Ellis (Tex. Civ. App.) 35 S. W. 1070, § 399.
 Byrn v. Kleas, 15 Tex. Civ. App. 205, 39 S. W. 980, §§ 232, 324.
 Byrne v. Byrne, 3 Tex. 330, §§ 333, 341.

C.

Cabell v. Menezzer (Tex. Civ. App.) 35 S. W. 206, §§ 191, 221, 298.
 Cadwallader v. Campbell (Tex. Civ. App.) 31 S. W. 829, § 239.
 Cadwallader v. Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917, § 259.
 Caffey v. Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738, §§ 91, 113, 304.
 Caffey v. Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65, § 180.
 Cage v. Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180, § 395.
 Cairrell v. Higgs, 1 Posey Unrep. Cas. (Tex.) 56, § 302.
 Caldwell v. Brown, 43 Tex. 216, § 301.
 Calhoun v. Stark, 13 Tex. Civ. App. 60, 35 S. W. 410, § 303.
 Callahan v. Houston, 78 Tex. 494, 14 S. W. 1027, § 82.
 Callahan v. Patterson, 4 Tex. 61, §§ 29, 107.
 Cameron v. Fay, 55 Tex. 58, §§ 205, 269.
 Cameron v. Gebhard, 85 Tex. 610, 22 S. W. 1033, §§ 124, 263.
 Cameron v. Marshall, 65 Tex. 7, § 263.
 Cameron v. Morris, 83 Tex. 14, 18 S. W. 422, §§ 373, 389.
 Camp v. Camp, 18 Tex. 528, §§ 335, 338.
 Campbell v. Antis, 21 Tex. Civ. App. 161, 51 S. W. 343, § 204.
 Campbell v. Crater, 95 N. C. 156, § 311.
 Campbell v. Crowley (Tex. Civ. App.) 56 S. W. 373, § 129.
 Campbell v. Elliott, 52 Tex. 151, § 295.
 Campbell v. Harris, 4 Tex. Civ. App. 630, 23 S. W. 35, § 287.
 Campbell v. McCampbell (Tex. Civ. App.) 34 S. W. 970, § 264.
 Campbell v. Macmanus, 32 Tex. 442, § 249.
 Canfield v. Moore, 16 Tex. Civ. App. 472, 41 S. W. 718, §§ 75, 184.
 Cannon v. Boutwell, 53 Tex. 626, §§ 41, 120, 172.
 Cannon v. Hemphill, 7 Tex. 184, § 286.
 Cannon v. Murphy, 31 Tex. 405, § 198.
 Carden v. Short (Tex. Civ. App.) 31 S. W. 246, § 129.
 Cardwell v. Rogers, 76 Tex. 37, 12 S. W. 1006, § 41.
 Carleton v. Goebler (Tex.) 58 S. W. 829, §§ 390, 399.
 Carleton v. Haywood, 49 N. H. 314, § 153.
 Carleton v. Roberts, 1 Posey Unrep. Cas. (Tex.) 587, § 241.
 Carlisle v. Sommer, 61 Tex. 124, §§ 191, 230.
 Carothers v. McNese, 43 Tex. 221, §§ 105, 206.
 Carr v. Tucker, 42 Tex. 330, §§ 188, 230.
 Carroll v. Carroll, 20 Tex. 732, §§ 13, 160.
 Carson v. Taylor, 19 Tex. Civ. App. 177, 47 S. W. 395, §§ 316, 319.
 Carter v. Bolin, 30 S. W. 1084, S. C. later decision, 11 Tex. Civ. App. 223,
 32 S. W. 123, §§ 228, 239.
 Carter v. Conner, 60 Tex. 52, §§ 390, 398, 399.
 Carter v. Jackson, 56 N. H. 364, § 153.

- Carter v. Kaiser** (Tenn. Ch. App.) 48 S. W. 265, § 294.
Carter v. Wise, 39 Tex. 273, § 198.
Cartwright v. Cartwright, 18 Tex. 626, §§ 168, 169, 221, 222.
Cartwright v. Hollis, 5 Tex. 152, §§ 25, 43, 49.
Cartwright v. Moore, 66 Tex. 55, 1 S. W. 263, § 304.
Caruth v. Grigsby, 57 Tex. 259, § 198.
Cason v. Laney (Tex. Civ. App.) 27 S. W. 420, §§ 31, 292.
Castro v. Illies, 22 Tex. 479, §§ 27, 279, 434.
Causici v. La Coste, 20 Tex. 269, § 200.
Cavil v. Walker, 7 Tex. Civ. App. 305, 26 S. W. 854, §§ 69, 219, 228.
Cayce v. Powell, 20 Tex. 767, §§ 280, 315, 322.
Caywood v. Henderson (Tex. Civ. App.) 44 S. W. 927, § 202.
C. B. Carter Lumber Co. v. Clay (Tex.) 10 S. W. 293, § 270.
Ceccato v. Deutschman, 19 Tex. Civ. App. 434, 47 S. W. 739, § 66.
Centennial Mut. L. Asso. v. Parham, 80 Tex. 518, 16 S. W. 316, § 73.
Central Coal & Coke Co. v. Henry (Tex. Civ. App.) 47 S. W. 281, § 295.
Central Kentucky Lunatic Asylum v. Craven, 98 Ky. 105, 32 S. W. 291, §§ 267, 272.
Cervenka v. Dyches (Tex. Civ. App.) 32 S. W. 316, § 202.
Chaison v. Beauchamp Bros. 12 Tex. Civ. App. 109, 34 S. W. 303, §§ 41, 68.
Chambers v. Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118, § 399.
Champion v. Shumate, 90 Tex. 597, 39 S. W. 128, 40 S. W. 394, § 379.
Chapman v. Allen, 15 Tex. 278, §§ 76, 179, 182, 231, 232, 284.
Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564, 88 Tex. 641, 16 Tex. Civ. App. 382, 41 S. W. 533, 32 S. W. 871, §§ 10, 19, 178, 364.
Chappell v. McIntyre, 9 Tex. 161, § 27.
Charles v. Chaney (Tex. Civ. App.) 26 S. W. 169, § 249.
Chase v. Gregg, 88 Tex. 552, 32 S. W. 520, § 162.
Chase v. Swayne, 88 Tex. 218, 30 S. W. 1049, §§ 251, 269.
Chauviere v. Fliege, 6 La. Ann. 56, § 153.
Cheek v. Bellows, 17 Tex. 613, §§ 60, 67, 105, 287.
Cheek v. Herndon, 82 Tex. 146, 17 S. W. 763, §§ 80, 397.
Chester v. Breitling (Tex. Civ. App.) 30 S. W. 464, 88 Tex. 586, 32 S. W. 527, § 101.
Chew v. State, 23 Tex. App. 230, 5 S. W. 373, § 12.
Chicago & S. W. R. Co. v. Swinney, 38 Iowa, 182, § 260.
Chicago, T. & M. C. R. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, § 260.
Chifflet v. Willis, 74 Tex. 245, 11 S. W. 1105, § 368.
Childers v. Henderson, 76 Tex. 667, 13 S. W. 481, §§ 373, 374.
Christmas v. Smith, 10 Tex. 123, § 57.
Church v. Chicago & A. R. Co. 119 Mo. 203, 23 S. W. 1056, § 285.
Citizens' Nat. Bank v. Jones, 22 Tex. Civ. App. 45, 54 S. W. 405, §§ 377, 384.
Claffin v. Pfeiffer, 76 Tex. 469, 13 S. W. 483, §§ 146, 182, 223, 224, 226, 228, 229, 231, 232.
Clapp v. Engledow, 72 Tex. 252, 10 S. W. 462, § 138.
Clardy v. Wilson (Tex. Civ. App.) 58 S. W. 52, §§ 34, 180, 201, 217, 223.

- Clark v. Cattron (Tex. Civ. App.) 56 S. W. 99, § 160.
Clark v. Clark, 21 Tex. Civ. App. 371, 51 S. W. 337, § 183.
Clark v. Goins (Tex. Civ. App.) 23 S. W. 703, §§ 365, 374.
Clark v. Groce, 16 Tex. Civ. App. 453, 41 S. W. 668, § 108.
Clark v. Nolan, 38 Tex. 416, § 250.
Clark v. Wicker (Tex. Civ. App.) 30 S. W. 1114, §§ 103, 105.
Clay v. Power, 24 Tex. 304, §§ 36, 286.
Clements v. Crawford, 42 Tex. 601, § 5.
Clements v. Ewing, 71 Tex. 370, 9 S. W. 312, § 105.
Clements v. Lacy, 51 Tex. 150, §§ 117, 259, 272.
Clemons v. Clemons, 92 Tex. 66, 45 S. W. 996, § 365.
Cleveland v. Cleveland, 89 Tex. 445, 35 S. W. 145, § 160.
Cleveland v. Cole, 65 Tex. 402, §§ 143, 187.
Cleveland v. Spencer (Tex. Civ. App.) 50 S. W. 405, §§ 141, 300.
Clift v. Clift, 72 Tex. 144, 10 S. W. 338, §§ 179, 205.
Clift v. Kaufman, 60 Tex. 64, § 373.
Cline v. Upton, 56 Tex. 319, §§ 233, 270.
Clitus v. Langford (Tex. Civ. App.) 24 S. W. 325, § 259.
Clopper v. Sage, 14 Tex. Civ. App. 296, 37 S. W. 363, §§ 108, 207.
Coates v. Caldwell, 71 Tex. 19, 8 S. W. 922, § 254.
Cobb v. Trammell, 9 Tex. Civ. App. 527, 30 S. W. 482, § 228.
Cochran v. Sonnen (Tex. Civ. App.) 26 S. W. 521, § 389.
Cockrell v. Curtis, 83 Tex. 105, 18 S. W. 436, §§ 272, 363, 374.
Cockrum v. McCracken, 1 Tex. App. Civ. Cas. (White & W.) § 65, § 141.
Cockrum v. McCracken, 1 Tex. App. Civ. Cas. (White & W.) § 66, § 399.
Coffey v. Hendricks, 66 Tex. 676, 2 S. W. 47, §§ 107, 109.
Coker v. Roberts, 71 Tex. 597, 9 S. W. 665, § 113.
Cole v. Bammel, 62 Tex. 108, §§ 114, 130, 134, 150.
Coleman v. First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, §§ 36, 38.
Coleman v. Vollmer (Tex. Civ. App.) 31 S. W. 413, §§ 5, 101.
Collier v. Betterton, 8 Tex. Civ. App. 479, 29 S. W. 490, § 248.
Collier v. Struby, 99 Tenn. 241, 47 S. W. 90, § 154.
Collins v. Ferguson, 22 Tex. Civ. App. 552, 56 S. W. 225, § 295.
Compton v. State, 13 Tex. App. 271, § 305.
Conn v. Davis, 33 Tex. 203, § 159.
Connell v. Chandler, 11 Tex. 249, § 368.
Conner v. Hawkins, 66 Tex. 639, 2 S. W. 520, § 187.
Continental Nat. Bank v. Weems, 69 Tex. 499, 6 S. W. 802, § 38.
Cook v. Bybee, 24 Tex. 278, § 284.
Cooke v. Bremond, 27 Tex. 457, §§ 179, 180, 182, 240.
Coombes v. Thomas, 57 Tex. 321, § 108.
Cooper v. Austin, 58 Tex. 494, § 64.
Cooper v. Basham (Tex.) 19 S. W. 704, § 270.
Cooper v. Pierce, 74 Tex. 526, 12 S. W. 211, §§ 369, 372.
Cooper v. Singleton, 19 Tex. 260, § 392.
Cordier v. Cage, 44 Tex. 532, §§ 381, 385.
Cordray v. Galveston (Tex. Civ. App.) 26 S. W. 245, §§ 66, 293, 322.

- Corley v. Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839, § 311.
Corley v. Renz (Tex. Civ. App.) 24 S. W. 935, §§ 286, 310.
Cornish v. Cornish, 56 Tex. 564, § 349.
Corsicana Cotton Oil Co. v. Valley, 14 Tex. Civ. App. 250, 36 S. W. 999, §§ 325, 398.
Corzine v. Williams, 85 Tex. 499, 22 S. W. 399, §§ 372, 390, 393.
Covington v. Burleson, 28 Tex. 368, §§ 46, 60, 70, 300, 320.
Cowan v. N. O. Nelson Mfg. Co. (Tex. Civ. App.) 34 S. W. 1045, § 204.
Cox v. Miller, 54 Tex. 16, §§ 49, 79, 90, 144, 172, 278.
Craddock v. Burleson, 21 Tex. Civ. App. 250, 52 S. W. 644, § 374.
Craddock v. Edwards, 81 Tex. 609, 17 S. W. 228, § 256.
Craddock v. Goodwin, 54 Tex. 578, §§ 286, 290.
Craig v. Craig, 31 Tex. 203, § 353.
Cravens v. Booth, 8 Tex. 243, §§ 107, 133.
Cravens v. White, 73 Tex. 577, 11 S. W. 543, § 64.
Crawford v. Doggett, 82 Tex. 139, 17 S. W. 929, § 153.
Craxton v. Ryan, 3 Tex. App. Civ. Cas. (Willson) § 367, §§ 189, 221.
Crayton v. Munger, 9 Tex. 285, § 128.
Creamer v. State, 34 Tex. 173, § 305.
Crenshaw v. Harris, 16 Tex. Civ. App. 263, 41 S. W. 391, § 184.
Crisp v. Thrash (Tex. Civ. App.) 52 S. W. 92, § 250.
Crocker v. Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870, §§ 365, 369, 373.
Crockett v. Templeton, 65 Tex. 134, § 272.
Cross v. Everts, 28 Tex. 523, §§ 107, 121, 122, 261.
Crosson v. Dwyer, 9 Tex. Civ. App. 482, 30 S. W. 929, § 160.
Crow v. Fiddler, 3 Tex. Civ. App. 576, 23 S. W. 17, §§ 182, 232, 326.
Cruger v. McCracken, 87 Tex. 584, 30 S. W. 537, § 76.
Cuellar v. De Witt, 5 Tex. Civ. App. 568, 24 S. W. 671, § 310.
Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177, § 365.
Cullers v. James, 66 Tex. 494, 1 S. W. 314, §§ 105, 252, 296.
Cullers v. May, 81 Tex. 110, 16 S. W. 813, § 390.
Cullum v. Price (Tex. Civ. App.) 23 S. W. 711, § 249.
Culmore v. Medlenka (Tex. Civ. App.) 44 S. W. 676, § 321.
Culp v. Jones (Tex. Civ. App.) 24 S. W. 1123, § 378.
Cumby v. Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673, §§ 5, 10, 19.
Cummings v. State, 36 Tex. Crim. Rep. 256, 36 S. W. 442, § 10.
Cummins v. Denton, 1 Posey Unrep. Cas. (Tex.) 181, § 372.
Cuneo v. De Cuneo (Tex. Civ. App.) 59 S. W. 284, §§ 19, 347.
Cuney v. Dupree, 21 Tex. 211, § 241.
Cunio v. Burland, 1 Posey Unrep. Cas. (Tex.) 469, §§ 239, 243.
Cunningham v. Coyle, 2 Tex. App. Civ. Cas. (Willson) § 422, §§ 286, 290.
Cunningham v. Cunningham, 22 Tex. Civ. App. 7, 53 S. W. 75, § 345.
Cunningham v. San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941, § 310.
Cunningham v. Taylor, 20 Tex. 126, § 399.
Curtis v. Cockrell, 9 Tex. Civ. App. 51, 28 S. W. 129, §§ 270, 335.

D.

- Dailey v. Houston, 58 Mo. 361, § 153.
Dallas & W. R. Co. v. Spicker, 61 Tex. 427, § 29.
Dalton v. Rust, 22 Tex. 134, § 132.
Daniel v. Mason, 90 Tex. 240, 38 S. W. 161, § 131.
Darrow v. Summerhill (Tex. Civ. App.) 58 S. W. 158, §§ 75, 311.
Daugherty v. Yates, 13 Tex. Civ. App. 646, 35 S. W. 937, § 109.
Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030, § 118.
Davis v. Agnew, 67 Tex. 206, 2 S. W. 43, 376, §§ 108, 112.
Davis v. Converse (Tex. Civ. App.) 46 S. W. 910, § 262.
Davis v. Harmon, 9 Tex. Civ. App. 356, 29 S. W. 492, §§ 395, 397.
Davis v. Kennedy, 58 Tex. 516, § 113.
Davis v. Laning, 85 Tex. 39, 18 L. R. A. 82, 19 S. W. 846, §§ 292, 363.
Davis v. McCartney, 64 Tex. 584, §§ 392, 400.
Davis v. Saladee, 57 Tex. 326, § 105.
Davis v. Taylor (Tex. Civ. App.) 33 S. W. 543, § 270.
Davis v. Weathered (Tex. Civ. App.) 43 S. W. 21, § 304.
Dawson v. Holt, 44 Tex. 174, §§ 377, 385, 392.
Day v. Stone, 59 Tex. 615, § 205.
De Bajligethy v. Johnson (Tex. Civ. App.) 56 S. W. 95, §§ 163, 259.
De Blane v. Lynch, 23 Tex. 25, §§ 187, 221.
De Bruhl v. Maas, 54 Tex. 464, §§ 117, 259.
Defee v. Defee (Tex. Civ. App.) 51 S. W. 274, § 359.
De Garca v. Galvan, 55 Tex. 53, § 93.
De Garcia v. Lazano (Tex. Civ. App.) 54 S. W. 280, § 72.
Dickerson v. Abernathy, 1 Posey Unrep. Cas. (Tex.) 107, §§ 396, 397.
Dickinson v. McLane, 57 N. H. 31, § 101.
Dickson v. Allen (Tex. Civ. App.) 24 S. W. 661, §§ 117, 253, 259.
Dill v. State, 1 Tex. App. 278, § 305.
Dixon v. Sanderson, 72 Tex. 359, 10 S. W. 535, § 190.
Dobkins v. Kuykendall, 81 Tex. 180, 16 S. W. 743, § 247.
Donnebaum v. Tinsley, 54 Tex. 362, § 93.
Dooley v. Montgomery, 72 Tex. 429, 2 L. R. A. 715, 10 S. W. 451, § 207.
Dorn v. Dunham, 24 Tex. 367, § 112.
Dotson v. Barnett, 16 Tex. Civ. App. 258, 41 S. W. 99, §§ 134, 252.
Douglas v. Baker, 79 Tex. 499, 15 S. W. 801, § 36.
Dublin v. Taylor, B. & H. R. Co. (Tex. Civ. App.) 49 S. W. 667, § 311.
Duke v. Reed, 64 Tex. 705, § 272.
Dumas v. State, 14 Tex. App. 464, §§ 12, 305.
Duncan v. Alexander, 83 Tex. 441, 18 S. W. 817, § 270.
Duncan v. Bickford, 83 Tex. 322, 18 S. W. 598, §§ 179, 182.
Duncan v. Rawls, 16 Tex. 478, §§ 392, 393.
Dungan v. State, 39 Tex. Crim. Rep. 115, 45 S. W. 19, § 305.
Dunham v. Chatham, 21 Tex. 231, §§ 80, 128, 138, 182, 216, 241.
Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388, § 108.
Dwyer v. Foley (Tex. Civ. App.) 35 S. W. 820, § 396.
Dykes v. O'Connor, 83 Tex. 160, 18 S. W. 490, § 271.

E.

- Eagan v. McWhirter, 71 Tex. 567, 9 S. W. 677, § 381.
- Eager v. Morris, 1 Tex. App. Civ. Cas. (White & W.) § 177, §§ 56, 57, 60, 234.
- Earle v. Earle, 9 Tex. 630, §§ 272, 374.
- Eastham v. Sims, 11 Tex. Civ. App. 133, 32 S. W. 359, §§ 393, 395.
- Eastman v. Eastman, 75 Tex. 473, 12 S. W. 1107, §§ 334, 338.
- Eberling v. Deutscher Verein, 72 Tex. 339, 12 S. W. 205, § 122.
- Eckhardt v. Schlecht, 29 Tex. 129, § 135.
- Eddie v. Tinnin, 7 Tex. Civ. App. 371, 26 S. W. 732, § 313.
- Edmonson v. Blessing, 42 Tex. 596, § 91.
- Edrington v. Mayfield, 5 Tex. 363, §§ 210, 212.
- Edrington v. Newland, 57 Tex. 627, § 194.
- Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87, §§ 149, 175.
- Edwards v. Dismukes, 53 Tex. 605, §§ 114, 284, 302.
- Edwards v. Osman, 84 Tex. 656, 19 S. W. 808, § 232.
- Elam v. Parkhill, 60 Tex. 581, § 112.
- Eldridge v. Parish, 6 Tex. Civ. App. 35, 25 S. W. 49, § 310.
- Ellerman v. Wurz (Tex.) 14 S. W. 333, §§ 247, 264.
- Ellington v. Ellington, 29 Tex. 2, § 274.
- Ellis, Ex parte, 37 Tex. Crim. Rep. 539, 40 S. W. 275, §§ 357, 359.
- Endick v. Endick, 61 Tex. 559, § 349.
- Engelhardt v. Batla (Tex. Civ. App.) 31 S. W. 324, § 259.
- Engleman v. Deal, 14 Tex. Civ. App. 1, 37 S. W. 652, §§ 159, 172, 218, 278.
- Epperson v. Jones, 65 Tex. 425, 69 Tex. 586, 7 S. W. 488, §§ 142, 146, 182.
- Equitable Mortg. Co. v. Norton, 71 Tex. 683, 10 S. W. 301, §§ 127, 129.
- Erwin v. Erwin (Tex. Civ. App.) 40 S. W. 53, §§ 347, 349, 350.
- Etheridge v. Price, 73 Tex. 597, 11 S. W. 1039, §§ 35, 42, 134.
- Evans v. Breneman (Tex. Civ. App.) 46 S. W. 80, § 317.
- Evans v. Opperman, 76 Tex. 293, 13 S. W. 312, §§ 160, 227.
- Evans v. Pace, 21 Tex. Civ. App. 368, 51 S. W. 1094, § 373.
- Evans v. Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350, §§ 182, 184, 221, 228, 232, 307.
- Evans v. Taylor, 60 Tex. 422, §§ 376, 377.
- Evans v. Welborn, 74 Tex. 530, 12 S. W. 230, § 239.
- Exall v. Security Mort. & Trust Co. 15 Tex. Civ. App. 643, 39 S. W. 959, § 253.
- Eylar v. Eylar, 60 Tex. 315, §§ 129, 265.
- Ezell v. Dodson, 60 Tex. 331, §§ 193, 287.

F.

- Fagan v. McWhirter, 71 Tex. 567, 9 S. W. 677, § 392.
- Farmer v. Hale, 14 Tex. Civ. App. 73, 37 S. W. 164, § 270.
- Farmer v. Simpson, 6 Tex. 304, § 117.
- Farr v. Wright, 27 Tex. 96, §§ 70, 300, 320.

- Farrar v. Bessey, 24 Vt. 89, § 312.
Farrell v. Palestine Loan Asso. (Tex. Civ. App.) 30 S. W. 814, § 108.
Fatheree, Ex parte, 34 Tex. Crim. Rep. 594, 31 S. W. 403, § 305.
Faulk v. Faulk, 23 Tex. 653, § 84.
Fermier v. Brannan, 21 Tex. Civ. App. 543, 53 S. W. 699, §§ 31, 67, 105, 296.
Ferris v. Parker, 13 Tex. 385, § 79.
F. F. Collins Mfg. Co. v. Carr, 11 Tex. Civ. App. 364, 32 S. W. 366, § 255.
Figures v. Gregg (Tex. Civ. App.) 39 S. W. 1011, § 184.
Finks v. Thompson, 11 Tex. Civ. App. 538, 32 S. W. 711, § 105.
Finley v. Finley (Ky.) 2 S. W. 554, § 338.
Finn v. Williamson, 75 Tex. 336, 12 S. W. 852, §§ 180, 395.
First Nat. Bank v. Campbell (Tex. Civ. App.) 46 S. W. 845, § 263.
First Nat. Bank v. Sharpe, 12 Tex. Civ. App. 223, 33 S. W. 676, § 11.
Fisk v. Flores, 43 Tex. 340, §§ 37, 186, 200.
Fitts v. Fitts, 14 Tex. 443, §§ 79, 169, 353, 356, 359.
Fitzgerald v. Turner, 43 Tex. 79, §§ 107, 128, 131.
Focke v. Sterling, 18 Tex. Civ. App. 8, 44 S. W. 611, §§ 270, 301, 318, 319.
Foot v. Card, 58 Conn. 1, 6 L. R. A. 829, 18 Atl. 1027, § 291.
Forbes v. Dunham, 24 Tex. 611, §§ 187, 221.
Forbes v. Moore, 32 Tex. 196, §§ 31, 60.
Forbes v. Thomas (Tex. Civ. App.) 51 S. W. 1097, §§ 112, 262.
Ford v. Ballard, 1 Tex. Civ. App. 376, 21 S. W. 146, § 101.
Ford v. Cowan, 64 Tex. 129, § 378.
Ford v. Fosgard (Tex. Civ. App.) 25 S. W. 445, Rev'd in 87 Tex. 185, 25 L. R. A. 155, 27 S. W. 57, § 270.
Ford v. Sims, 93 Tex. 586, 57 S. W. 20, § 365.
Foreman v. Meroney, 62 Tex. 723, § 373.
Fort v. Powell, 59 Tex. 321, § 248.
Fort Worth & D. C. R. Co. v. Floyd (Tex. Civ. App.) 21 S. W. 544, § 29.
Fossett v. McMahan, 74 Tex. 546, 12 S. W. 324, § 374.
Fossett v. McMahan, 86 Tex. 652, 26 S. W. 979, § 382.
Foust v. Sanger Bros. 13 Tex. Civ. App. 410, 35 S. W. 404, §§ 250, 253.
Fox v. Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024, § 116.
Frank v. DeLopez, 2 Tex. Civ. App. 245, 21 S. W. 279, §§ 383, 384.
Franklin v. Coffee, 18 Tex. 413, §§ 245, 247.
Freeman v. Hawkins, 77 Tex. 498, 14 S. W. 364, §§ 17, 293.
Freeman v. Preston (Tex. Civ. App.) 29 S. W. 495, § 108.
Freiberg v. De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151, §§ 68, 113.
Freiberg v. Walzem, 85 Tex. 264, 20 S. W. 60, § 266.
French v. Strumberg, 52 Tex. 92, §§ 63, 101, 308.
Frisby v. Withers, 61 Tex. 134, § 395.
Frost v. Erath Cattle Co. 81 Tex. 505, 17 S. W. 52, § 108.
Fullenwider v. Longmoor, 73 Tex. 480, 11 S. W. 500, § 124.
Fuller v. Ferguson, 26 Cal. 547, § 80.
Fullerton v. Doyle, 18 Tex. 3, §§ 60, 105, 287.

Furrh v. Winston, 66 Tex. 521, 1 S. W. 527, § 205.

Furtner v. Edgewood Distilling Co. 16 Tex. Civ. App. 359, 41 S. W. 184, § 248.

G.

G. v. G. L. R. 2 Prob. & Div. 287, § 330.

Gaines v. Gaines, 4 Tex. Civ. App. 408, 23 S. W. 465, §§ 365, 374.

Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407, §§ 193, 287.

Gallagher v. Keller (Tex. Civ. App.) 30 S. W. 248, S. C. 4 Tex. Civ. App. 454, 23 S. W. 296, §§ 247, 248.

Galveston, H. & S. A. R. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. 135, §§ 10, 12, 13, 19, 399.

Galveston, H. & S. A. R. Co. v. Kutac, 76 Tex. 473, 13 S. W. 327, § 287.

Galveston, H. & S. A. R. Co. v. Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647, §§ 229, 299.

Gamble v. Dabney, 20 Tex. 69, §§ 212, 225.

Garcia v. Illg, 14 Tex. Civ. App. 482, 37 S. W. 471, 45 S. W. 857, Rev'd on other grounds in 92 Tex. 251, 47 S. W. 717, § 101.

Gardner v. Douglass, 64 Tex. 76, § 248.

Garner v. Butcher, 1 Posey Unrep. Cas. (Tex.) 430, §§ 294, 320.

Garner v. Thompson, 2 Posey Unrep. Cas. (Tex.) 233, §§ 200, 395.

Garnett v. Jobe, 70 Tex. 696, 8 S. W. 505, § 394.

Garrison v. Ferguson (Tex. Civ. App.) 54 S. W. 247, § 374.

Gassaway v. White, 70 Tex. 475, 8 S. W. 117, § 253.

Gaston v. Wright, 83 Tex. 282, 18 S. W. 576, § 180.

Gatewood v. Scurlock, 2 Tex. Civ. App. 98, 21 S. W. 55, § 217.

Gaylord v. Loughridge, 50 Tex. 573, § 263.

Gebhard v. Gebhard, 25 Misc. 1, 54 N. Y. Supp. 406, § 361.

Gee v. Scott, 48 Tex. 510, § 302.

Gentry v. Bowser, 2 Tex. Civ. App. 388, 21 S. W. 569, §§ 254, 255.

George v. Stevens, 31 Tex. 670, § 60.

George v. Thomas, 16 Tex. 74, § 64.

German Ins. Co. v. Hunter (Tex. Civ. App.) 32 S. W. 344, §§ 85, 180, 217.

Gerrish, Ex parte (Tex. Crim. App.) 57 S. W. 1123, §§ 357, 359.

Ghent v. Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891, §§ 340, 358.

Gibbons v. Bell, 45 Tex. 417, § 64.

Gibbons v. Hall (Tex. Civ. App.) 59 S. W. 814, §§ 103, 259, 272.

Gibbs v. Mays, 2 Posey Unrep. Cas. (Tex.) 215, § 250.

Gibony v. Hutcheson, 20 Tex. Civ. App. 581, 50 S. W. 648, §§ 160, 162.

Giddings v. Crosby, 24 Tex. 295, §§ 372, 382.

Giersa v. Gray (Tex. Civ. App.) 31 S. W. 231, § 270.

Gilbough v. Stahl Bldg. Co. 16 Tex. Civ. App. 448, 41 S. W. 535, § 264.

Gilliam v. Null, 58 Tex. 298, § 372.

Gilliard v. Chessney, 13 Tex. 337, § 232.

Gillum v. Collier, 53 Tex. 592, §§ 117, 259.

Givens v. Hudson, 64 Tex. 471, §§ 373, 374.

Glasscock v. Hamilton, 62 Tex. 143, § 231.

- Glasscock v. Stringer (Tex. Civ. App.) 33 S. W. 677, §§ 266, 374.
Gober v. Smith (Tex. Civ. App.) 36 S. W. 910, § 259.
Goddard v. Reagan, 8 Tex. Civ. App. 272, 28 S. W. 352, § 223.
Goff v. Jones, 70 Tex. 572, 8 S. W. 525, §§ 122, 261.
Goldberg v. McCracken (Tex.) 8 S. W. 676, § 85.
Golden v. Galveston, 20 Tex. Civ. App. 584, 50 S. W. 416, § 50.
Goldsmith v. Herndon, 33 Tex. 705, § 200.
Good v. Coombs, 28 Tex. 35, § 392.
Goode v. Jasper, 71 Tex. 48, 9 S. W. 132, § 324.
Gordon v. McCall, 20 Tex. Civ. App. 283, 48 S. W. 1111, §§ 252, 304.
Gorman v. State, 42 Tex. 221, § 30.
Gouhenant v. Cockrell, 20 Tex. 96, § 270.
Graham v. Stuve, 76 Tex. 533, 13 S. W. 381, §§ 87, 172.
Grande v. Herrera, 15 Tex. 533, § 386.
Grandjean v. Runke (Tex. Civ. App.) 39 S. W. 945, §§ 204, 354.
Grandjean v. San Antonio (Tex. Civ. App.) 38 S. W. 837, 91 Tex. 435,
41 S. W. 477, 44 S. W. 476, §§ 72, 131.
Grant v. Whittlesey, 42 Tex. 320, §§ 204, 317.
Gray v. Kauffman, 82 Tex. 65, 17 S. W. 513, § 108.
Gray v. McFarland, 29 Tex. 163, § 368.
Gray v. Shelby, 83 Tex. 405, 18 S. W. 809, § 113.
Gray v. Thomas, 83 Tex. 246, 18 S. W. 721, §§ 352, 361.
Grayson v. Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121, § 313.
Green v. Chandler, 25 Tex. 148, § 121.
Green v. Crow, 17 Tex. 180, § 373.
Green v. Ferguson, 62 Tex. 525, §§ 79, 116, 144, 172, 278.
Green v. Grissom, 53 Tex. 432, §§ 378, 385.
Green v. Johnson (Tex. Civ. App.) 44 S. W. 6, § 265.
Green v. Raymond, 58 Tex. 80, § 379.
Green v. Rugely, 23 Tex. 539, § 399.
Green v. White, 18 Tex. Civ. App. 509, 45 S. W. 389, §§ 378, 385.
Greenwood v. State, 35 Tex. 587, § 305.
Gregory v. Van Vleck, 21 Tex. 40, § 118.
Griffie v. Maxey, 58 Tex. 210, §§ 372, 382.
Griffin v. Ford, 60 Tex. 501, § 378.
Griffin v. Towns (Tex. Civ. App.) 25 S. W. 968, § 311.
Groesbeck v. Bodman, 73 Tex. 287, 11 S. W. 322, §§ 107, 400.
Groesbeck v. Groesbeck, 78 Tex. 664, 14 S. W. 792, §§ 49, 276, 278.
Grooms v. Rust, 27 Tex. 231, § 241.
Groth v. Groth, 69 Ill. App. 68, § 357.
Grothaus v. De Lopez, 57 Tex. 670, §§ 392, 396.
Gulf, C. & S. F. R. Co. v. Donahoo, 59 Tex. 128, § 37.
Gulf, C. & S. F. Teleg. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689, § 287.
Gulf, W. T. & P. R. Co. v. Goldman, 8 Tex. Civ. App. 257, 28 S. W. 267, §
287.
Gulf, W. T. & P. R. Co. v. Goldman, 87 Tex. 567, 29 S. W. 1062, § 399.
Gunn v. Wynne (Tex. Civ. App.) 43 S. W. 290, §§ 256, 270.

Gurley v. Clarkson (Tex. Civ. App.) 30 S. W. 360, § 304.
Gurley v. Dickason, 19 Tex. Civ. App. 203, 46 S. W. 53, § 395.
Guy v. Metcalf, 83 Tex. 37, 18 S. W. 419, § 387.

H.

Haby v. Fuos (Tex. Civ. App.) 25 S. W. 1121, §§ 137, 138, 150.
Hagerty v. Harwell, 16 Tex. 663, § 340.
Hahn v. Goings, 22 Tex. Civ. App. 576, 56 S. W. 217, § 196.
Haines v. Haines, 62 Tex. 216, § 336.
Hair v. Wood, 58 Tex. 77, § 392.
Halbert v. Brown, 9 Tex. Civ. App. 335, 31 S. W. 535, §§ 41, 310.
Halbert v. Carroll (Tex. Civ. App.) 25 S. W. 1102, §§ 376, 386.
Halbert v. Hendrix (Tex. Civ. App.) 26 S. W. 911, § 101.
Hale v. Bonner, 82 Tex. 33, 14 L. R. A. 336, 17 S. W. 605, § 287.
Hale v. Hale, 47 Tex. 336, § 345.
Haley v. Gatewood, 74 Tex. 281, 12 S. W. 25, § 138.
Hall v. Dotson, 55 Tex. 520, § 123.
Hall v. Fields (Tex. Civ. App.) 81 Tex. 553, 17 S. W. 82, 30 S. W. 386, §§ 159, 373, 374.
Hall v. Gwynne, 4 Tex. Civ. App. 109, 23 S. W. 289, § 395.
Hall v. Hall, 52 Tex. 294, §§ 88, 191, 204, 218, 231, 283.
Hall v. Harris, 11 Tex. 300, §§ 27, 38.
Hall v. Layton, 16 Tex. 262, § 243.
Hamilton v. Brooks, 51 Tex. 142, §§ 37, 224.
Hamilton v. Peck (Tex. Civ. App.) 38 S. W. 403, §§ 50, 312.
Hamilton-Brown Shoe Co. v. Lastinger (Tex. Civ. App.) 26 S. W. 924, §§ 142, 144, 146.
Hamilton-Brown Shoe Co. v. Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520, §§ 90, 191, 218, 224.
Hampshire v. Floyd, 39 Tex. 103, § 107.
Hampton v. Gilliland (Tex. Civ. App.) 56 S. W. 572, § 252.
Hancock v. Morgan, 17 Tex. 582, § 249.
Hanna v. Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720, §§ 333, 349.
Hanna v. Ladewig, 73 Tex. 37, 11 S. W. 133, § 160.
Hannig v. Hannig (Tex. Civ. App.) 24 S. W. 695, § 335.
Hannum's Appeal, 9 Pa. 471, § 312.
Hanover F. Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344, § 180.
Harbison v. Tennison (Tex. Civ. App.) 38 S. W. 232, § 270.
Hardin v. Sparks, 70 Tex. 429, 7 S. W. 769, § 207.
Hardy v. Dunlap, 7 Tex. Civ. App. 339, 26 S. W. 852, § 310.
Hardy v. State, 37 Tex. Crim. Rep. 55, 38 S. W. 615, § 19.
Hare v. Hare, 10 Tex. 355, §§ 335, 339, 341, 342.
Hargadene v. Whitfield, 71 Tex. 482, 9 S. W. 475, §§ 250, 253.
Harkey v. Cain, 69 Tex. 146, 6 S. W. 637, § 254.
Harl v. Langdon, 60 Tex. 555, § 340.

- Clark v. Cattron (Tex. Civ. App.) 56 S. W. 99, § 160.
Clark v. Clark, 21 Tex. Civ. App. 371, 51 S. W. 337, § 183.
Clark v. Goins (Tex. Civ. App.) 23 S. W. 703, §§ 365, 374.
Clark v. Groce, 16 Tex. Civ. App. 453, 41 S. W. 668, § 108.
Clark v. Nolan, 38 Tex. 416, § 250.
Clark v. Wicker (Tex. Civ. App.) 30 S. W. 1114, §§ 103, 105.
Clay v. Power, 24 Tex. 304, §§ 36, 286.
Clements v. Crawford, 42 Tex. 601, § 5.
Clements v. Ewing, 71 Tex. 370, 9 S. W. 312, § 105.
Clements v. Lacy, 51 Tex. 150, §§ 117, 259, 272.
Clemons v. Clemons, 92 Tex. 66, 45 S. W. 996, § 365.
Cleveland v. Cleveland, 89 Tex. 445, 35 S. W. 145, § 160.
Cleveland v. Cole, 65 Tex. 402, §§ 143, 187.
Cleveland v. Spencer (Tex. Civ. App.) 50 S. W. 405, §§ 141, 300.
Clift v. Clift, 72 Tex. 144, 10 S. W. 338, §§ 179, 205.
Clift v. Kaufman, 60 Tex. 64, § 373.
Cline v. Upton, 56 Tex. 319, §§ 233, 270.
Clitus v. Langford (Tex. Civ. App.) 24 S. W. 325, § 259.
Clopper v. Sage, 14 Tex. Civ. App. 296, 37 S. W. 363, §§ 168, 207.
Coates v. Caldwell, 71 Tex. 19, 8 S. W. 922, § 254.
Cobb v. Trammell, 9 Tex. Civ. App. 527, 30 S. W. 482, § 228.
Cochran v. Sonnen (Tex. Civ. App.) 26 S. W. 521, § 389.
Cockrell v. Curtis, 83 Tex. 105, 18 S. W. 436, §§ 272, 363, 374.
Cockrum v. McCracken, 1 Tex. App. Civ. Cas. (White & W.) § 65, § 141.
Cockrum v. McCracken, 1 Tex. App. Civ. Cas. (White & W.) § 66, § 399.
Coffey v. Hendricks, 66 Tex. 676, 2 S. W. 47, §§ 107, 109.
Coker v. Roberts, 71 Tex. 597, 9 S. W. 665, § 113.
Cole v. Bammel, 62 Tex. 108, §§ 114, 130, 134, 150.
Coleman v. First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, §§ 36, 38.
Coleman v. Vollmer (Tex. Civ. App.) 31 S. W. 413, §§ 5, 101.
Collier v. Betterton, 8 Tex. Civ. App. 479, 29 S. W. 490, § 248.
Collier v. Struby, 99 Tenn. 241, 47 S. W. 90, § 154.
Collins v. Ferguson, 22 Tex. Civ. App. 552, 56 S. W. 225, § 295.
Compton v. State, 13 Tex. App. 271, § 305.
Conn v. Davis, 33 Tex. 203, § 159.
Connell v. Chandler, 11 Tex. 249, § 368.
Conner v. Hawkins, 66 Tex. 639, 2 S. W. 520, § 187.
Continental Nat. Bank v. Weems, 69 Tex. 499, 6 S. W. 802, § 38.
Cook v. Bybee, 24 Tex. 278, § 284.
Cooke v. Bremond, 27 Tex. 457, §§ 179, 180, 182, 240.
Coombes v. Thomas, 57 Tex. 321, § 108.
Cooper v. Austin, 58 Tex. 494, § 64.
Cooper v. Basham (Tex.) 19 S. W. 704, § 270.
Cooper v. Pierce, 74 Tex. 526, 12 S. W. 211, §§ 369, 372.
Cooper v. Singleton, 19 Tex. 260, § 392.
Cordier v. Cage, 44 Tex. 532, §§ 381, 385.
Cordray v. Galveston (Tex. Civ. App.) 26 S. W. 245, §§ 66, 293, 322.

- Corley v. Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839, § 311.
Corley v. Renz (Tex. Civ. App.) 24 S. W. 935, §§ 286, 310.
Cornish v. Cornish, 56 Tex. 564, § 349.
Corsicana Cotton Oil Co. v. Valley, 14 Tex. Civ. App. 250, 36 S. W. 999, §§ 325, 398.
Corzine v. Williams, 85 Tex. 499, 22 S. W. 399, §§ 372, 390, 393.
Covington v. Burleson, 28 Tex. 368, §§ 46, 60, 70, 300, 320.
Cowan v. N. O. Nelson Mfg. Co. (Tex. Civ. App.) 34 S. W. 1045, § 204.
Cox v. Miller, 54 Tex. 16, §§ 49, 79, 90, 144, 172, 278.
Craddock v. Burleson, 21 Tex. Civ. App. 250, 52 S. W. 644, § 374.
Craddock v. Edwards, 81 Tex. 609, 17 S. W. 228, § 256.
Craddock v. Goodwin, 54 Tex. 578, §§ 286, 290.
Craig v. Craig, 31 Tex. 203, § 353.
Cravens v. Booth, 8 Tex. 243, §§ 107, 133.
Cravens v. White, 73 Tex. 577, 11 S. W. 543, § 64.
Crawford v. Doggett, 82 Tex. 139, 17 S. W. 929, § 153.
Craxton v. Ryan, 3 Tex. App. Civ. Cas. (Willson) § 367, §§ 189, 221.
Crayton v. Munger, 9 Tex. 285, § 128.
Creamer v. State, 34 Tex. 173, § 305.
Crenshaw v. Harris, 16 Tex. Civ. App. 263, 41 S. W. 391, § 184.
Crisp v. Thrash (Tex. Civ. App.) 52 S. W. 92, § 250.
Crocker v. Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870, §§ 365, 369, 373.
Crockett v. Templeton, 65 Tex. 134, § 272.
Cross v. Everts, 28 Tex. 523, §§ 107, 121, 122, 261.
Crosson v. Dwyer, 9 Tex. Civ. App. 482, 30 S. W. 929, § 160.
Crow v. Fiddler, 3 Tex. Civ. App. 576, 23 S. W. 17, §§ 182, 232, 326.
Cruger v. McCracken, 87 Tex. 584, 30 S. W. 537, § 76.
Cuellar v. De Witt, 5 Tex. Civ. App. 568, 24 S. W. 671, § 310.
Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177, § 365.
Cullers v. James, 66 Tex. 494, 1 S. W. 314, §§ 105, 252, 296.
Cullers v. May, 81 Tex. 110, 16 S. W. 813, § 390.
Cullum v. Price (Tex. Civ. App.) 23 S. W. 711, § 249.
Culmore v. Medlenka (Tex. Civ. App.) 44 S. W. 676, § 321.
Culp v. Jones (Tex. Civ. App.) 24 S. W. 1123, § 378.
Cumby v. Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673, §§ 5, 10, 19.
Cummings v. State, 36 Tex. Crim. Rep. 256, 36 S. W. 442, § 10.
Cummins v. Denton, 1 Posey Unrep. Cas. (Tex.) 181, § 372.
Cuneo v. De Cuneo (Tex. Civ. App.) 59 S. W. 284, §§ 19, 347.
Cuney v. Dupree, 21 Tex. 211, § 241.
Cunio v. Burland, 1 Posey Unrep. Cas. (Tex.) 469, §§ 239, 243.
Cunningham v. Coyle, 2 Tex. App. Civ. Cas. (Willson) § 422, §§ 286, 290.
Cunningham v. Cunningham, 22 Tex. Civ. App. 7, 53 S. W. 75, § 345.
Cunningham v. San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941, § 310.
Cunningham v. Taylor, 20 Tex. 126, § 399.
Curtis v. Cockrell, 9 Tex. Civ. App. 51, 28 S. W. 129, §§ 270, 335.

D.

- Dailey v. Houston, 58 Mo. 361, § 153.
Dallas & W. R. Co. v. Spicker, 61 Tex. 427, § 29.
Dalton v. Rust, 22 Tex. 134, § 132.
Daniel v. Mason, 90 Tex. 240, 38 S. W. 161, § 131.
Darrow v. Summerhill (Tex. Civ. App.) 58 S. W. 158, §§ 75, 311.
Daugherty v. Yates, 13 Tex. Civ. App. 646, 35 S. W. 937, § 109.
Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030, § 118.
Davis v. Agnew, 67 Tex. 206, 2 S. W. 43, 376, §§ 108, 112.
Davis v. Converse (Tex. Civ. App.) 46 S. W. 910, § 262.
Davis v. Harmon, 9 Tex. Civ. App. 356, 29 S. W. 492, §§ 395, 397.
Davis v. Kennedy, 58 Tex. 516, § 113.
Davis v. Laning, 85 Tex. 39, 18 L. R. A. 82, 19 S. W. 846, §§ 292, 363.
Davis v. McCartney, 64 Tex. 584, §§ 392, 400.
Davis v. Saladee, 57 Tex. 326, § 105.
Davis v. Taylor (Tex. Civ. App.) 33 S. W. 543, § 270.
Davis v. Weathered (Tex. Civ. App.) 43 S. W. 21, § 304.
Dawson v. Holt, 44 Tex. 174, §§ 377, 385, 392.
Day v. Stone, 59 Tex. 615, § 205.
De Bajligethy v. Johnson (Tex. Civ. App.) 56 S. W. 95, §§ 163, 259.
De Blane v. Lynch, 23 Tex. 25, §§ 187, 221.
De Bruhl v. Maas, 54 Tex. 464, §§ 117, 259.
Defee v. Defee (Tex. Civ. App.) 51 S. W. 274, § 359.
De Garca v. Galvan, 55 Tex. 53, § 93.
De Garcia v. Lazano (Tex. Civ. App.) 54 S. W. 280, § 72.
Dickerson v. Abernathy, 1 Posey Unrep. Cas. (Tex.) 107, §§ 396, 397.
Dickinson v. McLane, 57 N. H. 31, § 101.
Dickson v. Allen (Tex. Civ. App.) 24 S. W. 661, §§ 117, 253, 259.
Dill v. State, 1 Tex. App. 278, § 305.
Dixon v. Sanderson, 72 Tex. 359, 10 S. W. 535, § 190.
Dobkins v. Kuykendall, 81 Tex. 180, 16 S. W. 743, § 247.
Donnebaum v. Tinsley, 54 Tex. 362, § 93.
Dooley v. Montgomery, 72 Tex. 429, 2 L. R. A. 715, 10 S. W. 451, § 207.
Dorn v. Dunham, 24 Tex. 367, § 112.
Dotson v. Barnett, 16 Tex. Civ. App. 258, 41 S. W. 99, §§ 134, 252.
Douglas v. Baker, 79 Tex. 499, 15 S. W. 801, § 36.
Dublin v. Taylor, B. & H. R. Co. (Tex. Civ. App.) 49 S. W. 667, § 311.
Duke v. Reed, 64 Tex. 705, § 272.
Dumas v. State, 14 Tex. App. 464, §§ 12, 305.
Duncan v. Alexander, 83 Tex. 441, 18 S. W. 817, § 270.
Duncan v. Bickford, 83 Tex. 322, 18 S. W. 598, §§ 179, 182.
Duncan v. Rawls, 16 Tex. 478, §§ 392, 393.
Dungan v. State, 39 Tex. Crim. Rep. 115, 45 S. W. 19, § 305.
Dunham v. Chatham, 21 Tex. 231, §§ 80, 128, 138, 182, 216, 241.
Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388, § 108.
Dwyer v. Foley (Tex. Civ. App.) 35 S. W. 820, § 396.
Dykes v. O'Connor, 83 Tex. 160, 18 S. W. 490, § 271.

E.

- Eagan v. McWhirter**, 71 Tex. 567, 9 S. W. 677, § 381.
Eager v. Morris, 1 Tex. App. Civ. Cas. (White & W.) § 177, §§ 56, 57, 60, 234.
Earle v. Earle, 9 Tex. 630, §§ 272, 374.
Eastham v. Sims, 11 Tex. Civ. App. 133, 32 S. W. 359, §§ 393, 395.
Eastman v. Eastman, 75 Tex. 473, 12 S. W. 1107, §§ 334, 338.
Eberling v. Deutscher Verein, 72 Tex. 339, 12 S. W. 205, § 122.
Eckhardt v. Schlecht, 29 Tex. 129, § 135.
Eddie v. Tinnin, 7 Tex. Civ. App. 371, 26 S. W. 732, § 313.
Edmonson v. Blessing, 42 Tex. 596, § 91.
Edrington v. Mayfield, 5 Tex. 363, §§ 210, 212.
Edrington v. Newland, 57 Tex. 627, § 194.
Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87, §§ 149, 175.
Edwards v. Dismukes, 53 Tex. 605, §§ 114, 284, 302.
Edwards v. Osman, 84 Tex. 656, 19 S. W. 868, § 232.
Elam v. Parkhill, 60 Tex. 581, § 112.
Eldridge v. Parish, 6 Tex. Civ. App. 35, 25 S. W. 40, § 310.
Ellerman v. Wurz (Tex.) 14 S. W. 333, §§ 247, 264.
Ellington v. Ellington, 29 Tex. 2, § 274.
Ellis, Ex parte, 37 Tex. Crim. Rep. 539, 40 S. W. 275, §§ 357, 359.
Endick v. Endick, 61 Tex. 559, § 349.
Engelhardt v. Batla (Tex. Civ. App.) 31 S. W. 324, § 250.
Engleman v. Deal, 14 Tex. Civ. App. 1, 37 S. W. 652, §§ 159, 172, 218, 278.
Epperson v. Jones, 65 Tex. 425, 69 Tex. 586, 7 S. W. 488, §§ 142, 146, 182.
Equitable Mortg. Co. v. Norton, 71 Tex. 683, 10 S. W. 301, §§ 127, 129.
Erwin v. Erwin (Tex. Civ. App.) 40 S. W. 53, §§ 347, 349, 350.
Etheridge v. Price, 73 Tex. 597, 11 S. W. 1039, §§ 35, 42, 134.
Evans v. Breneman (Tex. Civ. App.) 46 S. W. 80, § 317.
Evans v. Opperman, 76 Tex. 293, 13 S. W. 312, §§ 160, 227.
Evans v. Pace, 21 Tex. Civ. App. 368, 51 S. W. 1094, § 373.
Evans v. Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350, §§ 182, 184, 221, 228, 232, 307.
Evans v. Taylor, 60 Tex. 422, §§ 376, 377.
Evans v. Welborn, 74 Tex. 530, 12 S. W. 230, § 239.
Exall v. Security Mort. & Trust Co. 15 Tex. Civ. App. 643, 39 S. W. 959, § 253.
Eylar v. Eylar, 60 Tex. 315, §§ 129, 265.
Ezell v. Dodson, 60 Tex. 331, §§ 193, 287.

F.

- Fagan v. McWhirter**, 71 Tex. 567, 9 S. W. 677, § 392.
Farmer v. Hale, 14 Tex. Civ. App. 73, 37 S. W. 164, § 270.
Farmer v. Simpson, 6 Tex. 304, § 117.
Farr v. Wright, 27 Tex. 96, §§ 70, 300, 320.

- Farrar v. Bessey**, 24 Vt. 89, § 312.
Farrell v. Palestine Loan Asso. (Tex. Civ. App.) 30 S. W. 814, § 108.
Fatheree, Ex parte, 34 Tex. Crim. Rep. 594, 31 S. W. 403, § 305.
Faulk v. Faulk, 23 Tex. 653, § 84.
Fermier v. Brannan, 21 Tex. Civ. App. 543, 53 S. W. 699, §§ 31, 67, 105, 296.
Ferris v. Parker, 13 Tex. 385, § 79.
F. F. Collins Mfg. Co. v. Carr, 11 Tex. Civ. App. 364, 32 S. W. 366, § 255.
Figures v. Gregg (Tex. Civ. App.) 39 S. W. 1011, § 184.
Finks v. Thompson, 11 Tex. Civ. App. 538, 32 S. W. 711, § 105.
Finley v. Finley (Ky.) 2 S. W. 554, § 338.
Finn v. Williamson, 75 Tex. 336, 12 S. W. 852. §§ 180, 395.
First Nat. Bank v. Campbell (Tex. Civ. App.) 46 S. W. 845, § 263.
First Nat. Bank v. Sharpe, 12 Tex. Civ. App. 223, 33 S. W. 676, § 11.
Fisk v. Flores, 43 Tex. 340, §§ 37, 186, 200.
Fitts v. Fitts, 14 Tex. 443, §§ 79, 169, 353, 356, 359.
Fitzgerald v. Turner, 43 Tex. 79, §§ 107, 128, 131.
Focke v. Sterling, 18 Tex. Civ. App. 8, 44 S. W. 611. §§ 270, 301, 318, 319.
Foot v. Card, 58 Conn. 1, 6 L. R. A. 829, 18 Atl. 1027, § 291.
Forbes v. Dunham, 24 Tex. 611, §§ 187, 221.
Forbes v. Moore, 32 Tex. 196, §§ 31, 60.
Forbes v. Thomas (Tex. Civ. App.) 51 S. W. 1097, §§ 112, 202.
Ford v. Ballard, 1 Tex. Civ. App. 376, 21 S. W. 146, § 101.
Ford v. Cowan, 64 Tex. 129, § 378.
Ford v. Fosgard (Tex. Civ. App.) 25 S. W. 445, Rev'd in 87 Tex. 185, 25 L. R. A. 155, 27 S. W. 57, § 270.
Ford v. Sims, 93 Tex. 586, 57 S. W. 20, § 365.
Foreman v. Meroney, 62 Tex. 723, § 373.
Fort v. Powell, 59 Tex. 321, § 248.
Fort Worth & D. C. R. Co. v. Floyd (Tex. Civ. App.) 21 S. W. 544. § 29.
Fossett v. McMahan, 74 Tex. 546, 12 S. W. 324, § 374.
Fossett v. McMahan, 86 Tex. 652, 26 S. W. 979, § 382.
Foust v. Sanger Bros. 13 Tex. Civ. App. 410, 35 S. W. 404, §§ 250, 253.
Fox v. Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024, § 116.
Frank v. DeLopez, 2 Tex. Civ. App. 245, 21 S. W. 279, §§ 383, 384.
Franklin v. Coffee, 18 Tex. 413, §§ 245, 247.
Freeman v. Hawkins, 77 Tex. 498, 14 S. W. 364, §§ 17, 293.
Freeman v. Preston (Tex. Civ. App.) 29 S. W. 495, § 108.
Freiberg v. De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151, §§ 68, 113.
Freiberg v. Walzem, 85 Tex. 264, 20 S. W. 60, § 266.
French v. Strumberg, 52 Tex. 92, §§ 63, 101, 308.
Frisby v. Withers, 61 Tex. 134, § 395.
Frost v. Erath Cattle Co. 81 Tex. 505, 17 S. W. 52, § 108.
Fullenwider v. Longmoor, 73 Tex. 480, 11 S. W. 500, § 124.
Fuller v. Ferguson, 26 Cal. 547, § 80.
Fullerton v. Doyle, 18 Tex. 3, §§ 60, 105, 287.

Furrh v. Winston, 66 Tex. 521, 1 S. W. 527, § 205.

Furtner v. Edgewood Distilling Co. 16 Tex. Civ. App. 359, 41 S. W. 184, § 248.

G.

G. v. G. L. R. 2 Prob. & Div. 287, § 330.

Gaines v. Gaines, 4 Tex. Civ. App. 408, 23 S. W. 465, §§ 365, 374.

Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407, §§ 193, 287.

Gallagher v. Keller (Tex. Civ. App.) 30 S. W. 248, S. C. 4 Tex. Civ. App. 454, 23 S. W. 296, §§ 247, 248.

Galveston, H. & S. A. R. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. 135, §§ 10, 12, 13, 19, 399.

Galveston, H. & S. A. R. Co. v. Kutac, 76 Tex. 473, 13 S. W. 327, § 287.

Galveston, H. & S. A. R. Co. v. Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647, §§ 229, 299.

Gamble v. Dabney, 20 Tex. 69, §§ 212, 225.

Garcia v. Illg, 14 Tex. Civ. App. 482, 37 S. W. 471, 45 S. W. 857, Rev'd on other grounds in 92 Tex. 251, 47 S. W. 717, § 101.

Gardner v. Douglass, 64 Tex. 76, § 248.

Garner v. Butcher, 1 Posey Unrep. Cas. (Tex.) 430, §§ 294, 320.

Garner v. Thompson, 2 Posey Unrep. Cas. (Tex.) 233, §§ 200, 395.

Garnett v. Jobe, 70 Tex. 696, 8 S. W. 505, § 394.

Garrison v. Ferguson (Tex. Civ. App.) 54 S. W. 247, § 374.

Gassaway v. White, 70 Tex. 475, 8 S. W. 117, § 253.

Gaston v. Wright, 83 Tex. 282, 18 S. W. 576, § 180.

Gatewood v. Scurlock, 2 Tex. Civ. App. 98, 21 S. W. 55, § 217.

Gaylord v. Loughridge, 50 Tex. 573, § 263.

Gebhard v. Gebhard, 25 Misc. 1, 54 N. Y. Supp. 406, § 361.

Gee v. Scott, 48 Tex. 510, § 302.

Gentry v. Bowser, 2 Tex. Civ. App. 388, 21 S. W. 569, §§ 254, 255.

George v. Stevens, 31 Tex. 670, § 60.

George v. Thomas, 16 Tex. 74, § 64.

German Ins. Co. v. Hunter (Tex. Civ. App.) 32 S. W. 344, §§ 85, 180, 217.

Gerrish, Ex parte (Tex. Crim. App.) 57 S. W. 1123, §§ 357, 359.

Ghent v. Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891, §§ 340, 358.

Gibbons v. Bell, 45 Tex. 417, § 64.

Gibbons v. Hall (Tex. Civ. App.) 59 S. W. 814, §§ 103, 259, 272.

Gibbs v. Mays, 2 Posey Unrep. Cas. (Tex.) 215, § 259.

Gibony v. Hutcheson, 20 Tex. Civ. App. 581, 50 S. W. 648, §§ 160, 162.

Giddings v. Crosby, 24 Tex. 295, §§ 372, 382.

Giersa v. Gray (Tex. Civ. App.) 31 S. W. 231, § 270.

Gilbough v. Stahl Bldg. Co. 16 Tex. Civ. App. 448, 41 S. W. 535, § 264.

Gilliam v. Null, 58 Tex. 298, § 372.

Gilliard v. Chessney, 13 Tex. 337, § 232.

Gillum v. Collier, 53 Tex. 592, §§ 117, 259.

Givens v. Hudson, 64 Tex. 471, §§ 373, 374.

Glasscock v. Hamilton, 62 Tex. 143, § 231.

- Glasscock v. Stringer (Tex. Civ. App.) 33 S. W. 677, §§ 266, 374.
Gober v. Smith (Tex. Civ. App.) 36 S. W. 910, § 259.
Goddard v. Reagan, 8 Tex. Civ. App. 272, 28 S. W. 352, § 223.
Goff v. Jones, 70 Tex. 572, 8 S. W. 525, §§ 122, 261.
Goldberg v. McCracken (Tex.) 8 S. W. 676, § 85.
Golden v. Galveston, 20 Tex. Civ. App. 584, 50 S. W. 416, § 50.
Goldsmith v. Herndon, 33 Tex. 705, § 200.
Good v. Coombs, 28 Tex. 35, § 392.
Goode v. Jasper, 71 Tex. 48, 9 S. W. 132, § 324.
Gordon v. McCall, 20 Tex. Civ. App. 283, 48 S. W. 1111, §§ 252, 304.
Gorman v. State, 42 Tex. 221, § 30.
Gouhenant v. Cockrell, 20 Tex. 96, § 270.
Graham v. Stuve, 76 Tex. 533, 13 S. W. 381, §§ 87, 172.
Grande v. Herrera, 15 Tex. 533, § 386.
Grandjean v. Runke (Tex. Civ. App.) 39 S. W. 945, §§ 204, 354.
Grandjean v. San Antonio (Tex. Civ. App.) 38 S. W. 837, 91 Tex. 435,
41 S. W. 477, 44 S. W. 476, §§ 72, 131.
Grant v. Whittlesey, 42 Tex. 320, §§ 204, 317.
Gray v. Kauffman, 82 Tex. 65, 17 S. W. 513, § 108.
Gray v. McFarland, 29 Tex. 163, § 368.
Gray v. Shelby, 83 Tex. 405, 18 S. W. 809, § 113.
Gray v. Thomas, 83 Tex. 246, 18 S. W. 721, §§ 352, 361.
Grayson v. Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121, § 313.
Green v. Chandler, 25 Tex. 148, § 121.
Green v. Crow, 17 Tex. 180, § 373.
Green v. Ferguson, 62 Tex. 525, §§ 79, 116, 144, 172, 278.
Green v. Grissom, 53 Tex. 432, §§ 378, 385.
Green v. Johnson (Tex. Civ. App.) 44 S. W. 6, § 265.
Green v. Raymond, 58 Tex. 80, § 379.
Green v. Rugely, 23 Tex. 539, § 399.
Green v. White, 18 Tex. Civ. App. 509, 45 S. W. 389, §§ 378, 385.
Greenwood v. State, 35 Tex. 587, § 305.
Gregory v. Van Vleck, 21 Tex. 40, § 118.
Griffie v. Maxey, 58 Tex. 210, §§ 372, 382.
Griffin v. Ford, 60 Tex. 501, § 378.
Griffin v. Towns (Tex. Civ. App.) 25 S. W. 968, § 311.
Groesbeck v. Bodman, 73 Tex. 287, 11 S. W. 322, §§ 107, 400.
Groesbeck v. Groesbeck, 78 Tex. 664, 14 S. W. 792, §§ 49, 276, 278.
Grooms v. Rust, 27 Tex. 231, § 241.
Groth v. Groth, 69 Ill. App. 68, § 357.
Grothaus v. De Lopez, 57 Tex. 670, §§ 392, 396.
Gulf, C. & S. F. R. Co. v. Donahoo, 59 Tex. 128, § 37.
Gulf, C. & S. F. Teleg. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689, § 287.
Gulf, W. T. & P. R. Co. v. Goldman, 8 Tex. Civ. App. 257, 28 S. W. 267, §
287.
Gulf, W. T. & P. R. Co. v. Goldman, 87 Tex. 567, 29 S. W. 1062, § 399.
Gunn v. Wynne (Tex. Civ. App.) 43 S. W. 290, §§ 256, 270.

Gurley v. Clarkson (Tex. Civ. App.) 30 S. W. 360, § 304.
 Gurley v. Dickason, 19 Tex. Civ. App. 203, 46 S. W. 53, § 395.
 Guy v. Metcalf, 83 Tex. 37, 18 S. W. 419, § 387.

H.

Haby v. Fuos (Tex. Civ. App.) 25 S. W. 1121, §§ 137, 138, 159.
 Hagerty v. Harwell, 16 Tex. 663, § 340.
 Hahn v. Goings, 22 Tex. Civ. App. 576, 56 S. W. 217, § 196.
 Haines v. Haines, 62 Tex. 216, § 336.
 Hair v. Wood, 58 Tex. 77, § 392.
 Halbert v. Brown, 9 Tex. Civ. App. 335, 31 S. W. 535, §§ 41, 310.
 Halbert v. Carroll (Tex. Civ. App.) 25 S. W. 1102, §§ 376, 386.
 Halbert v. Hendrix (Tex. Civ. App.) 26 S. W. 911, § 101.
 Hale v. Bonner, 82 Tex. 33, 14 L. R. A. 336, 17 S. W. 605, § 287.
 Hale v. Hale, 47 Tex. 336, § 345.
 Haley v. Gatewood, 74 Tex. 281, 12 S. W. 25, § 138.
 Hall v. Dotson, 55 Tex. 520, § 123.
 Hall v. Fields (Tex. Civ. App.) 81 Tex. 553, 17 S. W. 82, 30 S. W. 386, §§ 159, 373, 374.
 Hall v. Gwynne, 4 Tex. Civ. App. 109, 23 S. W. 289, § 395.
 Hall v. Hall, 52 Tex. 294, §§ 88, 191, 204, 218, 231, 283.
 Hall v. Harris, 11 Tex. 300, §§ 27, 38.
 Hall v. Layton, 16 Tex. 262, § 243.
 Hamilton v. Brooks, 51 Tex. 142, §§ 37, 224.
 Hamilton v. Peck (Tex. Civ. App.) 38 S. W. 403, §§ 50, 312.
 Hamilton-Brown Shoe Co. v. Lastinger (Tex. Civ. App.) 26 S. W. 924, §§ 142, 144, 146.
 Hamilton-Brown Shoe Co. v. Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520, §§ 90, 191, 218, 224.
 Hampshire v. Floyd, 39 Tex. 103, § 107.
 Hampton v. Gilliland (Tex. Civ. App.) 56 S. W. 572, § 252.
 Hancock v. Morgan, 17 Tex. 582, § 249.
 Hanna v. Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720, §§ 333, 349.
 Hanna v. Ladewig, 73 Tex. 37, 11 S. W. 133, § 160.
 Hannig v. Hannig (Tex. Civ. App.) 24 S. W. 695, § 335.
 Hannum's Appeal, 9 Pa. 471, § 312.
 Hanover F. Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344, § 180.
 Harbison v. Tennison (Tex. Civ. App.) 38 S. W. 232, § 270.
 Hardin v. Sparks, 70 Tex. 429, 7 S. W. 769, § 207.
 Hardy v. Dunlap, 7 Tex. Civ. App. 339, 26 S. W. 852, § 310.
 Hardy v. State, 37 Tex. Crim. Rep. 55, 38 S. W. 615, § 19.
 Hare v. Hare, 10 Tex. 355, §§ 335, 339, 341, 342.
 Hargadene v. Whitfield, 71 Tex. 482, 9 S. W. 475, §§ 250, 253.
 Harkey v. Cain, 69 Tex. 146, 6 S. W. 637, § 254.
 Harl v. Langdon, 60 Tex. 555, § 340.

- Harle v. Richards, 78 Tex. 80, 14 S. W. 257, §§ 270, 396.
Harmon v. Bynum, 40 Tex. 324, § 369.
Harmsen v. Wesche (Tex. Civ. App.) 32 S. W. 192, § 129.
Harrell v. Harrell (Tex. Civ. App.) 42 S. W. 1040, § 331.
Harrell v. Houston, 66 Tex. 278, 17 S. W. 731, § 304.
Harris v. Finberg, 46 Tex. 79, § 47.
Harris v. Hardeman, 15 Tex. 466, § 149.
Harris v. Hobbs, 22 Tex. Civ. App. 367, 54 S. W. 1085, §§ 178, 364.
Harris v. Seinsheimer, 67 Tex. 356, 3 S. W. 307, § 364.
Harris v. Warlick (Tex. Civ. App.) 42 S. W. 356, § 304.
Harris v. Wells, 85 Tex. 312, 20 S. W. 68, § 311.
Harris v. Williams, 44 Tex. 124, §§ 46, 54, 58, 60, 300.
Harrison v. Mansur-Tibbetts Implement Co. 16 Tex. Civ. App. 630, 41 S. W. 842, § 228.
Harrison v. Oberthier, 40 Tex. 385, § 373.
Harrison v. Sulphur Springs (Tex. Civ. App.) 50 S. W. 1064, § 311.
Hartley v. Frosh, 6 Tex. 208, §§ 113, 286.
Hartwell v. Jackson, 7 Tex. 576, §§ 79, 80.
Harvey v. Carroll, 72 Tex. 63, 10 S. W. 334, S. C. 5 Tex. Civ. App. 324, 23 S. W. 713, §§ 308, 344.
Harvey v. Cummings, 68 Tex. 599, 5 S. W. 513, §§ 206, 352.
Harvey v. Hill, 7 Tex. 591, §§ 44, 94.
Hasseldenz v. Dofflemyre (Tex. Civ. App.) 45 S. W. 830, §§ 393, 400.
Haswell v. Forbes, 8 Tex. Civ. App. 82, 27 S. W. 566, §§ 129, 249.
Hatchett v. Conner, 30 Tex. 104, §§ 286, 299.
Hawes v. Parrish, 16 Tex. Civ. App. 497, 41 S. W. 132, § 129.
Hawkes v. Robertson (Tex. Civ. App.) 40 S. W. 548, § 300.
Hawley v. Geer (Tex.) 17 S. W. 914, § 183.
Hayden v. McMillan, 4 Tex. Civ. App. 479, 23 S. W. 430, §§ 187, 188.
Hayden v. Moffatt, 74 Tex. 647, 12 S. W. 820, §§ 108, 112.
Hayden Saddlery Hardware Co. v. Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595, § 116.
Hayes v. Taylor, 17 Tex. Civ. App. 449, 43 S. W. 314, § 267.
Haygood v. Haygood, 25 Tex. 576, §§ 347, 352.
Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90, §§ 28, 338, 341, 350.
Haynes v. Stovall, 23 Tex. 625, §§ 46, 57, 58, 60.
Heady v. Bexar Bldg. & L. Asso. (Tex. Civ. App.) 26 S. W. 468, §§ 124, 263.
Heathcock v. Goodrich, 2 Posey Unrep. Cas. (Tex.) 584, § 372.
Heatherly v. Little (Tex. Civ. App.) 40 S. W. 445, § 264.
Heatherly v. Little, 21 Tex. Civ. App. 664, 52 S. W. 980, § 249.
Hector v. Knox, 63 Tex. 613, §§ 105, 117.
Heidenheimer v. Felker, 1 Tex. App. Civ. Cas. (White & W.) § 362, § 144.
Heidenheimer v. Loring, 6 Tex. Civ. App. 560, 26 S. W. 99, §§ 34, 208.
Heidenheimer v. Thomas, 63 Tex. 287, §§ 31, 103, 105.
Heidenheimer Bros. v. McKeen, 63 Tex. 229, §§ 143, 184.
Heidenheimer Bros. v. Stewart, 65 Tex. 321, § 129.

- Hemmingway v. Mathews, 10 Tex. 207, § 62.
 Henderson v. Beaton, 1 Posey Unrep. Cas. (Tex.) 17, § 41.
 Henderson v. Ford, 46 Tex. 627, §§ 28, 245, 272.
 Henderson v. Terry, 62 Tex. 281, § 322.
 Hendrick v. Hendrick, 13 Tex. Civ. App. 49, 34 S. W. 804, § 249.
 Hendrix v. Hendrix, 46 Tex. 6, § 373.
 Henkel v. Bohnke, 7 Tex. Civ. App. 16, 26 S. W. 645, § 262.
 Hennessy v. Savings & Loan Co. 22 Tex. Civ. App. 591, 55 S. W. 124, § 252.
 Henry v. Corpus Christi Nat. Bank (Tex. Civ. App.) 44 S. W. 568, § 247.
 Henry v. Forshee, 84 Tex. 185, 19 S. W. 381, § 362.
 Henry v. Voltz, 1 Tex. App. Civ. Cas. (White & W.) § 775, § 154.
 Hensel v. International Bldg. & L. Asso. 85 Tex. 215, 20 S. W. 116, §§ 265, 382, 392.
 Hensley v. Lewis, 82 Tex. 595, 17 S. W. 913, § 149.
 Hensley v. Shields, 6 Tex. Civ. App. 136, 25 S. W. 37, § 270.
 Henson v. Sackville, 2 Tex. Civ. App. 416, 21 S. W. 187, § 319.
 Herndon v. Reed, 82 Tex. 647, 18 S. W. 665, § 80.
 Hickman v. Stewart, 69 Tex. 255, 5 S. W. 833, § 136.
 Hicks v. Hicks (Tex. Civ. App.) 26 S. W. 227, § 304.
 Hicks v. Morris, 57 Tex. 658, §§ 117, 265.
 Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803, § 267.
 Higgins v. Johnson, 20 Tex. 389, §§ 80, 85, 182.
 Hill v. Fairfax, 38 Tex. 220, § 5.
 Hill v. Hill, 85 Tex. 103, 19 S. W. 1016, § 270.
 Hill v. McDermot, Dallam (Tex.) 419, § 27.
 Hill v. Moore, 62 Tex. 610, § 175.
 Hill v. Moore, 85 Tex. 335, 19 S. W. 162, §§ 311, 395.
 Hill v. Spear, 48 Tex. 583, § 112.
 Hines v. Nelson (Tex. Civ. App.) 24 S. W. 541, §§ 129, 270.
 Hinzle v. Moody, 13 Tex. Civ. App. 193, 35 S. W. 832, §§ 255, 270.
 Hirshfeld v. Howard (Tex. Civ. App.) 59 S. W. 55, §§ 206, 227.
 Hodge v. Donald, 55 Tex. 344, § 198.
 Hoffman v. Hoffman, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471, §§ 372, 373.
 Holder v. State, 35 Tex. Crim. Rep. 19, 29 S. W. 793, §§ 9, 19.
 Holliman v. Smith, 39 Tex. 357, §§ 246, 256.
 Hollingsworth v. Davis, 62 Tex. 438, §§ 383, 390, 399.
 Hollis v. Border, 10 Tex. 277, § 123.
 Hollis v. Francois, 5 Tex. 195, §§ 44, 56, 75, 94, 118, 123.
 Holloway v. Holloway, 30 Tex. 164, § 299.
 Holloway v. McIlhenny Co. 77 Tex. 657, 14 S. W. 240, § 184.
 Holloway v. Shuttles, 21 Tex. Civ. App. 188, 51 S. W. 293, § 283.
 Honey v. Clark, 37 Tex. 686, § 4.
 Hoover v. State, 35 Tex. Crim. Rep. 342, 33 S. W. 337, § 305.
 Horn v. Arnold, 52 Tex. 161, § 373.
 Horner v. Liddiard, 1 Hagg. Consist. Rep. 337, § 7.
 Hough v. Shippey, 16 Tex. Civ. App. 88, 40 S. W. 332, S. C. 19 Tex. Civ. App. 596, 47 S. W. 672, § 373.
 M. W.—c.

- House v. Brent, 69 Tex. 27, 7 S. W. 65, § 363.
House v. Phelan, 83 Tex. 595, 19 S. W. 140, § 254.
Houston v. Killough, 80 Tex. 296, 16 S. W. 56, § 392.
Houston v. Newsome, 82 Tex. 75, 17 S. W. 603, § 253.
Houston v. Schrimpf, 31 Tex. 667, § 299.
Houston v. Sneed, 15 Tex. 307, § 65.
Houston & G. N. R. Co. v. Winter, 44 Tex. 597, §§ 248, 254.
Houston & T. C. R. Co. v. Lackey, 12 Tex. Civ. App. 229, 33 S. W. 768, §§ 290, 298.
Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834, §§ 298, 299, 317.
Houston City Street R. Co. v. Sciacca, 80 Tex. 350, 16 S. W. 31, § 288.
Houx v. Blum, 9 Tex. Civ. App. 588, 29 S. W. 1135, § 307.
Howard v. North, 5 Tex. 290, §§ 315, 319.
Howard v. York, 20 Tex. 670, § 185.
Howard v. Zimpelman (Tex.) 14 S. W. 59, § 243.
Howe v. O'Brien (Tex. Civ. App.) 45 S. W. 813, § 270.
Howell v. Stephenson (Tex. Civ. App.) 36 S. W. 302, §§ 129, 136.
Hubbard v. Hubbard (Tex. Civ. App.) 38 S. W. 388, § 354.
Huckabay v. Huckabay, 35 Tex. 620, § 341.
Huff v. Clark, 59 Tex. 347, § 124.
Huilker v. Huilker, 64 Tex. 1, § 334.
Hull v. Naumberg, 1 Tex. Civ. App. 132, 20 S. W. 1125, § 253.
Hull v. State (Tex. Crim. App.) 47 S. W. 472, § 305.
Hunt v. Matthews (Tex. Civ. App.) 60 S. W. 674, §§ 223, 239.
Hunter v. Hunter (Tex. Civ. App.) 45 S. W. 820, §§ 80, 82, 85, 217.
Huppman v. Schmidt, 65 Tex. 583, §§ 376, 383, 387.
Hurley v. Lockett, 72 Tex. 262, 12 S. W. 212, § 197.
Hurst v. Finley (Tex. Civ. App.) 54 S. W. 1072, § 112.
Hurst v. Finley, 22 Tex. Civ. App. 605, 55 S. W. 388, § 108.
Hurt v. Cooper, 63 Tex. 362, §§ 113, 120.
Huss v. Wells, 17 Tex. Civ. App. 195, 44 S. W. 33, §§ 131, 258, 270.
Hussey v. Moser, 70 Tex. 42, 7 S. W. 606, §§ 107, 310.
Huston v. Curl, 8 Tex. 239, §§ 116, 182, 223.
Hutcheson v. Storrie, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848, § 267.
Hutchins v. Masterson, 46 Tex. 551, § 254.
Hutchinson v. Mitchell, 39 Tex. 487, § 225.
Hutchinson v. Underwood, 27 Tex. 255, §§ 57, 58.
Huth v. Huth, 10 Tex. Civ. App. 184, 30 S. W. 240, § 349.

I.

- Ikard v. Thompson, 81 Tex. 285, 16 S. W. 1019, § 118.
Iken v. Olenick, 42 Tex. 195, §§ 244, 249, 250, 253.
Inge v. Cain, 65 Tex. 75, §§ 251, 262.
Ingersol v. McWillie, 9 Tex. Civ. App. 543, 87 Tex. 647, 30 S. W. 56, 869, §§ 10, 19, 304.

- Ingle v. Lea, 70 Tex. 609, 8 S. W. 325, § 249.
International & G. N. R. Co. v. Anthony (Tex. Civ. App.) 57 S. W. 897, § 193.
International Bldg. & L. Asso. v. Fortassain (Tex. Civ. App.) 23 S. W. 496, § 263.
Interstate Bldg. & L. Asso. v. Barker, 16 Tex. Civ. App. 676, 39 S. W. 317, § 262.
Interstate Bldg. & L. Asso. v. Goforth (Tex.) 59 S. W. 871, § 110.
Investors' Mortg. Secur. Co. v. Loyd, 11 Tex. Civ. App. 449, 33 S. W. 750, § 259.

J.

- Jacks v. Dillon, 6 Tex. Civ. App. 192, 25 S. W. 645, § 207.
Jackson v. Bradshaw (Tex. Civ. App.) 57 S. W. 878, § 265.
Jackson v. Cross, 36 Tex. 193, § 287.
Jackson v. Houston, 84 Tex. 622, 19 S. W. 799, § 313.
Jacobs v. Cunningham, 32 Tex. 774, § 298.
Jacobs v. Hawkins, 63 Tex. 1, §§ 249, 262.
James v. Daniels (Tex. Civ. App.) 43 S. W. 26, § 259.
James v. Fulcrod, 5 Tex. 512, § 241.
James v. Jacques, 26 Tex. 320, § 75.
James v. James, 81 Tex. 373, 16 S. W. 1087, § 91.
James v. Turner, 78 Tex. 241, 14 S. W. 574, § 376.
Jamison v. Lewis (Tex. Civ. App.) 35 S. W. 954, § 270.
J. B. Watkins Land & Mortg. Co. v. Abbott, 14 Tex. Civ. App. 447, 37 S. W. 252, § 250.
Jeffus v. Allen, 56 Tex. 195, § 321.
Jergens v. Schiele, 61 Tex. 255, § 295.
Jernigan v. Jernigan, 37 Tex. 420, § 347.
John v. Battle, 58 Tex. 591, §§ 130, 284.
Johns v. Johns, 44 Tex. 40, § 332.
Johnson v. Bryan, 62 Tex. 623, §§ 108, 112, 128, 131.
Johnson v. Burford, 39 Tex. 242, §§ 182, 186, 219.
Johnson v. Erado (Tex. Civ. App.) 50 S. W. 139, § 287.
Johnson v. First Nat. Bank (Tex. Civ. App.) 40 S. W. 334, § 239.
Johnson v. Harrison, 48 Tex. 257, § 392.
Johnson v. Johnson (Tex. Civ. App.) 23 S. W. 1022, §§ 200, 336, 341.
Johnson v. Johnson, 65 Tex. 87, § 64.
Johnson v. Schumacher, 72 Tex. 334, 12 S. W. 207, § 310.
Johnson v. State, 28 Tex. App. 17, 11 S. W. 667, § 305.
Johnson v. Taylor, 43 Tex. 121, § 381.
Johnson v. Taylor, 60 Tex. 360, §§ 110, 112.
Johnson v. Thompson (Tex. Civ. App.) 50 S. W. 1055, § 108.
Johnston v. Martin, 81 Tex. 18, 16 S. W. 550, § 247.
Jones v. Epperson, 69 Tex. 586, 7 S. W. 488, § 146.
Jones v. Goff, 63 Tex. 248, §§ 122, 261.

Jones v. Jones (Tex. Civ. App.) 41 S. W. 413, §§ 334, 341, 353.
Jones v. Jones, 15 Tex. 143, § 392.
Jones v. Jones, 60 Tex. 451, §§ 334, 339, 341, 346.
Jones v. Lee (Tex. Civ. App.) 41 S. W. 195, § 249.
Jones v. Norton, 10 Tex. 120, § 302.
Jones v. Robbins, 74 Tex. 615, 12 S. W. 824, §§ 108, 120, 270.
Jones v. State, 31 Tex. Crim. Rep. 252, 20 S. W. 578, § 156.
Jones v. State, 38 Tex. Crim. Rep. 87, 40 S. W. 807, 41 S. W. 638, § 305.
Jones v. Whiteselle (Tex. Civ. App.) 29 S. W. 177, § 269.
Jordan v. Godman, 19 Tex. 273, § 256.
Jordan v. Imthurn, 51 Tex. 276, §§ 378, 385.
Jordan v. Jordan, 4 Tex. Civ. App. 559, 23 S. W. 531, § 360.
Jordan v. Peak, 38 Tex. 426, § 262.
J. S. Brown Hardware Co. v. Matwitz, 10 Tex. Civ. App. 461, 32 S. W. 78, §§ 233, 239.

K.

Kahler v. Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160, § 304.
Kahn v. Kahn (Tex. Civ. App.) 56 S. W. 946 (Tex.) 58 S. W. 825, § 85.
Kainer v. Blank, 6 Tex. Civ. App. 1, 24 S. W. 851, § 262.
Kalamazoo Nat. Bank v. Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350, §§ 124, 263.
Kallman v. Ludenecker, 9 Tex. Civ. App. 182, 28 S. W. 579, §§ 134, 262, 265.
Kamey v. Thorp, 61 Tex. 648, § 90.
Kaufman v. Alexander, 2 Posey Unrep. Cas. (Tex.) 532, § 302.
Kaufman v. Fore, 73 Tex. 308, 11 S. W. 278, § 270.
Kavanaugh v. Brown, 1 Tex. 481, §§ 43, 46, 75.
Keith v. Hyndman, 57 Tex. 425, § 250.
Keller v. Beattie (Tex. Civ. App.) 34 S. W. 667, § 270.
Kellett v. Kellett (Tex. Civ. App.) 56 S. W. 766, § 172.
Kellett v. Kellett (Tex.) 59 S. W. 809, § 329.
Kelley v. Embree, 1 Tex. App. Civ. Cas. (White & W.) § 192, § 300.
Kelley v. Whitmore, 41 Tex. 647, § 290.
Kelly v. Owen, 7 Wall. 496, 19 L. ed. 283, § 28.
Kempner v. Comer, 73 Tex. 196, 11 S. W. 194, §§ 37, 39, 129, 151, 262.
Kempner v. Huddleston, 90 Tex. 182, 37 S. W. 1066, § 134.
Kendrick v. Taylor, 27 Tex. 695, §§ 84, 213.
Kerr v. Oppenheimer, 20 Tex. Civ. App. 140, 49 S. W. 149, § 266.
Keyser v. Clifton (Tex. Civ. App.) 50 S. W. 957, § 180.
Keyser v. Pilgrim, 25 Tex. Supp. 217, § 27.
Kidwell v. Carson, 3 Tex. Civ. App. 327, 22 S. W. 534, § 396.
Kimberlin v. Westerman, 75 Tex. 127, 12 S. W. 978, § 232.
Kincaid v. Jones, 2 Posey, Unrep. Cas. (Tex.) 534, § 109.
King v. C. M. Hapgood Shoe Co. 21 Tex. Civ. App. 217, 51 S. W. 532, §§ 247, 251, 253.
King v. Gilleland, 60 Tex. 271, § 372.

King v. Harter, 70 Tex. 579, 8 S. W. 308, §§ 270, 373.
King v. Holden (Tex.) 16 S. W. 898, § 180.
Kinlow v. Kinlow, 72 Tex. 639, 10 S. W. 729, § 178.
Kiolhassa v. Raley, 1 Tex. Civ. App. 165, 23 S. W. 253, §§ 262, 396.
Kirby v. Giddings, 75 Tex. 679, 13 S. W. 27, § 268.
Kirby v. Moody, 84 Tex. 201, 19 S. W. 453, § 175.
Kirk v. Houston Direct Nav. Co. 49 Tex. 213, §§ 180, 240.
Kirkland v. Little, 41 Tex. 456, § 385.
Kirkwood v. Domnau, 80 Tex. 645, 16 S. W. 428, § 355.
Klein v. Glass, 53 Tex. 37, § 123.
Klenk v. Knoble, 37 Ark. 298, § 260.
Kocourek v. Marak, 54 Tex. 201, §§ 112-114.
Koenigham v. Sherwood, 79 Tex. 508, 16 S. W. 23, § 128.
Kosminsky v. Goldberg, 44 Ark. 401, § 153.
Krohn v. Krohn, 5 Tex. Civ. App. 125, 23 S. W. 848, § 225.
Krueger v. Wolf, 12 Tex. Civ. App. 167, 33 S. W. 663, §§ 373, 382.
Kuhn v. Foster, 16 Tex. Civ. App. 465, 41 S. W. 716, § 150.
Kutch v. Holley, 77 Tex. 220, 14 S. W. 32, §§ 111, 270.

L.

Labbe v. Abat, 2 La. 53, § 80.
Lacey v. Clements, 36 Tex. 661, 51 Tex. 150, §§ 28, 272.
Lacy v. Lockett, 82 Tex. 190, 17 S. W. 916, §§ 373, 380.
Lacy v. Rollins, 74 Tex. 566, 12 S. W. 314, §§ 262, 381, 396.
Lafargue v. Markley, 55 Ark. 423, 18 S. W. 542, § 152.
Laird v. Thomas, 22 Tex. 276, §§ 47, 280, 318, 322.
Lake v. Boulware, 12 Tex. Civ. App. 660, 35 S. W. 24, § 251.
Lake v. Copeland, 82 Tex. 464, 17 S. W. 786, § 160.
La Master v. Dickson, 17 Tex. Civ. App. 473, 43 S. W. 911, § 255.
La Master v. Dickson, 91 Tex. 593, 45 S. W. 1, §§ 216, 307.
Lane v. Phillips, 69 Tex. 240, 6 S. W. 610, § 245.
Lang v. Rickmers, 70 Tex. 108, 7 S. W. 527, § 90.
Langston v. Maxey, 74 Tex. 155, 12 S. W. 27, § 270.
Langton v. Marshall, 59 Tex. 296, §§ 108, 117.
La Riviere v. La Riviere, 97 Mo. 80, 10 S. W. 840, § 11.
Lauchheimer v. Saunders, 19 Tex. Civ. App. 392, 47 S. W. 543, § 250.
Lavell v. Lapowski, 85 Tex. 168, 19 S. W. 1004, § 253.
Lawson v. Kelley, 82 Tex. 457, 17 S. W. 717, § 387.
Leatherwood v. Arnold, 66 Tex. 414, 1 S. W. 173, §§ 377-379, 384, 397.
Leaverton v. Leaverton, 40 Tex. 218, § 368.
Lecomte v. Toudouze, 82 Tex. 208, 17 S. W. 1047, §§ 65, 136.
Lee v. Crosby, 1 Tex. App. Civ. Cas. (White & W.) § 141, § 301.
Lee v. Green, 58 S. W. 847, § 69.
Lee v. Henderson, 75 Tex. 190, 12 S. W. 981, § 203.
Lee v. Kingsbury, 13 Tex. 68, § 262.
Lee v. McFarland, 19 Tex. Civ. App. 292, 46 S. W. 281, § 162.

- Lee v. Smith, 18 Tex. 141, § 16.
Lee v. Turner, 71 Tex. 264, 9 S. W. 149, §§ 229, 287.
Lee v. Welborne, 71 Tex. 500, 9 S. W. 471, §§ 252, 255.
Leeds v. Reed (Tex. Civ. App.) 36 S. W. 347, § 287.
Le Gierse v. Moore, 59 Tex. 470, § 212.
Lemons v. Stratton, 5 Tex. Civ. App. 403, 24 S. W. 370, § 396.
Lennox v. Sanders (Tex. Civ. App.) 54 S. W. 1076, § 259.
Levy v. Williams, 20 Tex. Civ. App. 651, 49 S. W. 930, 50 S. W. 528, § 239.
Lewis v. Ames, 44 Tex. 319, § 8.
Lewis v. Simon, 72 Tex. 470, 10 S. W. 554, §§ 80, 82, 217.
Libby v. Berry, 74 Me. 286, § 155.
Light v. Brown (Tex. Civ. App.) 26 S. W. 886, § 262.
Lignoski v. Crooker, 86 Tex. 324, 24 S. W. 278, 788, § 264.
Linares v. Linares, 93 Tex. 84, 53 S. W. 579, §§ 373, 374.
Linch v. Broad, 70 Tex. 92, 6 S. W. 751, § 373.
Linn v. Willis, 1 Posey, Unrep. Cas. (Tex.) 158, §§ 39, 151, 294, 320.
Linskie v. Kerr (Tex. Civ. App.) 34 S. W. 765, § 384.
Lippencott v. York, 86 Tex. 276, 24 S. W. 275, § 264.
Little v. Baker (Tex.) 11 S. W. 549, §§ 248, 270.
Little v. Birdwell, 27 Tex. 688, §§ 137, 369.
Little Rock v. Wright, 58 Ark. 142, 23 S. W. 876, § 260.
Littleton v. Giddings, 47 Tex. 109, § 392.
Livingston v. Williams, 75 Tex. 653, 13 S. W. 173, § 5.
Llano Improv. & Furnace Co. v. Cross, 5 Tex. Civ. App. 175, 24 S. W. 77, § 400.
Lochhausen v. Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513, § 135.
Locke v. Bonnell, 14 Tex. Civ. App. 354, 37 S. W. 250, § 270.
Lockhart v. White, 18 Tex. 102, §§ 13, 368, 369.
Loessin v. Washington (Tex. Civ. App.) 57 S. W. 990, § 248.
Lone Star Brewing Co. v. Felder (Tex. Civ. App.) 31 S. W. 524, § 264.
Long v. Moore, 19 Tex. Civ. App. 363, 48 S. W. 43, §§ 395, 397.
Long v. Walker, 47 Tex. 173, §§ 385, 394.
Looney v. Adamson, 48 Tex. 619, §§ 108, 110.
Loper v. Western U. Teleg. Co. 70 Tex. 689, 8 S. W. 600, §§ 193, 287.
Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642, §§ 30, 334, 347.
Lott v. Kaiser, 61 Tex. 665, §§ 85, 356.
Lott v. Keach, 5 Tex. 394, § 179.
Love v. Robertson, 7 Tex. 6, §§ 27, 182, 223.
Lovenberg v. Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024, § 267.
Low v. Felton, 84 Tex. 378, 19 S. W. 693, § 399.
Low v. Tandy, 70 Tex. 745, 8 S. W. 620, § 252.
Lucas v. Lucas, 2 Tex. 113, § 333.
Lucas v. State, 36 Tex. Crim. Rep. 397, 37 S. W. 427, § 36.
Luhn v. Stone, 65 Tex. 439, § 252.
Lumpkin v. Murrell, 46 Tex. 51, §§ 389, 397.
Lumpkin v. Nicholson, 10 Tex. Civ. App. 108, 30 S. W. 568, §§ 262, 270.

- Luzenberg v. Bexar Bldg. & L. Asso. 9 Tex. Civ. App. 261, 29 S. W. 237, § 263.
Lynch v. Elkes, 21 Tex. 229, §§ 46, 60, 70, 320.
Lyon v. Ozee, 66 Tex. 95, 17 S. W. 405, §§ 124, 263.
Lyttle v. Harris, 2 Posey Unrep. Cas. (Tex.) 21, § 290.

M.

- Mabry v. Ward, 50 Tex. 404, § 372.
McAfee v. Robertson, 41 Tex. 355, §§ 50, 67.
McAlister v. Farley, 39 Tex. 553, § 397.
McAlister v. McAlister, 71 Tex. 695, 10 S. W. 294, §§ 334, 336, 341.
McAllister v. Godbold (Tex. Civ. App.) 29 S. W. 417, §§ 159, 373.
McBride v. Banguss, 65 Tex. 174, § 228.
McBride v. Moore (Tex. Civ. App.) 37 S. W. 450, §§ 252, 395.
McCamly v. Waterhouse, 80 Tex. 340, 16 S. W. 19, § 62.
McC Campbell v. Henderson, 50 Tex. 601, § 399.
McCartney v. McCartney, 93 Tex. 359, 55 S. W. 310, §§ 82, 85.
McCarty v. Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997, §§ 117, 259, 265.
McCelvey v. Cryer (Tex. Civ. App.) 37 S. W. 175, § 326.
McClary v. Duckworth (Tex. Civ. App.) 57 S. W. 317, § 162.
McClelland v. McClelland (Tex. Civ. App.) 37 S. W. 350, §§ 66, 225.
McClure v. Bryant, 18 Tex. Civ. App. 141, 44 S. W. 3, § 392.
McConnico v. Thompson, 19 Tex. Civ. App. 539, 47 S. W. 537, §§ 311, 363.
McCord v. Holloman (Tex. Civ. App.) 46 S. W. 114, §§ 138, 364.
McCormick v. Blum, 4 Tex. Civ. App. 9, 22 S. W. 1054, 1120, § 123.
McCormick v. McNell, 53 Tex. 15, § 274.
McCown v. Owens, 15 Tex. Civ. App. 346, 40 S. W. 336, §§ 160, 364.
McCulloch v. McCulloch, 69 Tex. 682, 7 S. W. 593, §§ 331, 344.
McCulloch v. Renn, 28 Tex. 793, § 118.
McCutchen v. Purinton, 84 Tex. 603, 19 S. W. 710, §§ 180, 182, 232.
McDaniel v. Garrett, 11 Tex. Civ. App. 57, 31 S. W. 721, § 118.
McDaniel v. Harley (Tex. Civ. App.) 42 S. W. 323, §§ 208, 392.
McDaniel v. Weiss, 53 Tex. 257, § 180.
McDannell v. Horrell, 1 Posey, Unrep. Cas. (Tex.) 521, §§ 108, 112, 114.
McDannell v. Ragsdale, 71 Tex. 23, 8 S. W. 625, § 270.
McDonald v. Campbell, 57 Tex. 614, § 253.
McDonald v. McGuire, 8 Tex. 361, §§ 310, 313.
McDonna v. Wells, 1 Posey, Unrep. Cas. (Tex.) 35, § 87.
McDougal v. Bradford, 80 Tex. 558, 16 S. W. 619, §§ 232, 373.
McDuffie v. Greenway, 24 Tex. 625, § 275.
McElroy v. McGoffin, 68 Tex. 208, 4 S. W. 547, § 270.
McFaddin v. Crumpler, 20 Tex. 374, § 57.
McFalls v. Brown (Tex. Civ. App.) 37 S. W. 784, § 113.
McGillivray v. Eggleston, 11 Tex. Civ. App. 35, 31 S. W. 539, § 387.
McGowan v. McGowan (Tex. Civ. App.) 50 S. W. 399, § 335.

- McGowen v. Bush, 17 Tex. 195, § 12.
 McGowen v. McGowen, 52 Tex. 657, §§ 335, 349.
 McIntire v. Chappell, 2 Tex. 378, §§ 281, 298.
 McIntyre v. Chappell, 4 Tex. 187, §§ 27, 28.
 McKamey v. Thorp, 61 Tex. 648, §§ 224, 233, 239.
 McKay v. Treadwell, 8 Tex. 176, §§ 37, 286, 302.
 McKellar v. Peck, 39 Tex. 381, 2 Posey, Unrep. Cas. (Tex.) 192, §§ 109, 110.
 McKie v. Anderson, 78 Tex. 207, 14 S. W. 576, § 108.
 McKinney v. Matthews (Tex.) 6 S. W. 793, §§ 108, 131, 132.
 McKinney v. Moore, 73 Tex. 470, 11 S. W. 493, § 364.
 McKinney v. Nunn, 82 Tex. 44, 17 S. W. 516, §§ 207, 326.
 McKissick v. Colquhoun, 18 Tex. 148, § 94.
 McLane v. Paschal, 47 Tex. 365, § 382.
 McLane v. Paschal, 74 Tex. 20, 11 S. W. 837, § 382.
 McLaren v. Jones, 89 Tex. 131, 33 S. W. 849, §§ 128, 131.
 McLean v. State, 32 Tex. Crim. Rep. 521, 24 S. W. 898, § 305.
 McLeod v. Board, 30 Tex. 238, § 276.
 McMillan v. Hendricks (Tex. Civ. App.) 46 S. W. 859, § 374.
 McMiller v. Butler, 20 Tex. 402, § 399.
 McMurray v. McMurray, 78 Tex. 584, 14 S. W. 895, S. C. 67 Tex. 605, 4 S. W. 357, § 361.
 McNeil v. Moore, 7 Tex. Civ. App. 536, 27 S. W. 163, § 262.
 McQueen v. Fulgham, 27 Tex. 463, § 153.
 McReynolds v. Bowlby, 1 Posey, Unrep. Cas. (Tex.) 452, § 200.
 McShan v. Myers, 1 Posey, Unrep. Cas. (Tex.) 100, § 252.
 Madden v. Madden, 79 Tex. 595, 15 S. W. 480, § 262.
 Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 657, § 205.
 Magee v. Rice, 37 Tex. 483, §§ 355, 376.
 Magee v. White, 23 Tex. 180, §§ 1, 29, 35, 46, 56-58, 60.
 Mahon v. Barnett (Tex. Civ. App.) 45 S. W. 24, § 304.
 Malone v. Kornrumpf, 84 Tex. 454, 19 S. W. 607, § 270.
 Malry v. Grant (Tex. Civ. App.) 48 S. W. 614, § 233.
 Manchaca v. Field, 62 Tex. 135, § 198.
 Mangum v. White, 16 Tex. Civ. App. 254, 41 S. W. 80, § 395.
 Mann v. Kelsey, 71 Tex. 609, 12 S. W. 43, § 268.
 Mann v. State, 44 Tex. 642, § 306.
 March v. Huyter, 50 Tex. 243, §§ 158, 161.
 Mariposa Land & Cattle Co. v. Silliman, 87 Tex. 142, 26 S. W. 978, § 392.
 Markham v. Carothers, 47 Tex. 21, § 243.
 Marks v. Crume, 16 Ky. L. Rep. 707, 29 S. W. 436, § 15.
 Marks v. Hill, 46 Tex. 345, §§ 198, 370.
 Marler v. Handy, 88 Tex. 421, 31 S. W. 636, §§ 256, 259, 270.
 Marlin v. Kosmyroski (Tex. Civ. App.) 27 S. W. 1042, § 184.
 Maroney Hardware Co. v. Connellee (Tex. Civ. App.) 25 S. W. 448, §§ 254, 270.
 Marston v. Ward, 35 Tex. 797, § 286.

- Martin v. Moran, 11 Tex. Civ. App. 509, 32 S. W. 904, §§ 147, 162, 195.
Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S. W. 975, §§ 191, 218, 283.
Martin Clothing Co. v. Henly, 83 Tex. 592, 19 S. W. 167, § 250.
Marx v. Baker, 10 Tex. Civ. App. 148, 29 S. W. 908, § 262.
Massie v. McKee (Tex. Civ. App.) 56 S. W. 119, § 90.
Masterson v. Stevens (Tex. Civ. App.) 37 S. W. 364, Reversed on other grounds in 90 Tex. 417, 39 S. W. 292, 921, § 395.
Matlock v. Glover, 63 Tex. 231, §§ 50, 320.
Maxson v. Jennings, 19 Tex. Civ. App. 700, 48 S. W. 781, §§ 116, 183.
May v. San Antonio & A. P. Town Site Co. 83 Tex. 502, 18 S. W. 959, § 160.
Mayers v. Paxton, 78 Tex. 196, 14 S. W. 568, § 266.
Mayes v. Jones, 62 Tex. 365, § 399.
Mayman v. Reviere, 47 Tex. 357, § 372.
Mayo v. Tudor, 74 Tex. 471, 12 S. W. 117, § 137.
Mead v. Randolph, 8 Tex. 191, §§ 241, 243.
Mealy v. Lipp, 16 Tex. Civ. App. 163, 40 S. W. 824; 91 Tex. 182, 42 S. W. 544, §§ 159, 270.
Medlenka v. Downing, 59 Tex. 32, § 249.
Medrano v. State, 32 Tex. Crim. Rep. 214, 22 S. W. 684, § 15.
Menard v. Schneider (Tex. Civ. App.) 48 S. W. 761, § 57.
Menard v. Sydnor, 29 Tex. 257, §§ 46, 60, 300, 318.
Merrielles v. State Bank, 5 Tex. Civ. App. 483, 24 S. W. 564, § 234.
Merritt v. State, 39 Tex. Crim. Rep. 70, 45 S. W. 21, § 305.
Methery v. Walker, 17 Tex. 593, § 249.
Mexia v. Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016, §§ 295, 310, 321.
Mexican C. R. Co. v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778, §§ 34, 398.
Meyer v. Claus, 15 Tex. 516, §§ 28, 117.
Meyer v. Opperman, 76 Tex. 105, 13 S. W. 174, § 392.
Meyer v. State (Tex. Crim. App.) 41 S. W. 632, § 303.
Middlebrook Bros. v. Zapp, 73 Tex. 29, 10 S. W. 732, §§ 142, 144, 145, 194, 287.
Milburn v. Walker, 11 Tex. 329, §§ 1, 56, 57, 234, 294, 312.
Milburn Wagon Co. v. Kennedy, 75 Tex. 212, 13 S. W. 28, §§ 247, 270.
Miles v. Kelley, 16 Tex. Civ. App. 147, 40 S. W. 599, §§ 111, 262, 264.
Miller v. Koertge, 70 Tex. 162, 7 S. W. 691, § 80.
Miller v. Marx, 65 Tex. 131, §§ 141, 144.
Miller v. Menke, 56 Tex. 539, § 253.
Miller v. Miller, 72 Tex. 250, 12 S. W. 167, § 333.
Miller v. State, 37 Tex. Crim. Rep. 575, 40 S. W. 313, § 305.
Miller v. Sweitzer, 22 Mich. 391, § 153.
Miller v. Thatcher, 9 Tex. 482, § 241.
Miller v. Yturria, 69 Tex. 549, 7 S. W. 206, § 243.
Millikin v. Smoot, 71 Tex. 759, 12 S. W. 59, § 223.
Mills v. Brown, 69 Tex. 244, 6 S. W. 612, § 199.
Minter v. Burnett, 90 Tex. 245, 38 S. W. 350, § 363.

- Missouri, K. & T. R. Co. v. Hennesey, 20 Tex. Civ. App. 316, 49 S. W. 917, § 287.
- Missouri, K. & T. R. Co. v. Starr, 22 Tex. Civ. App. 353, 55 S. W. 393, §§ 221, 284, 286.
- Missouri P. R. Co. v. Henry, 75 Tex. 220, 12 S. W. 828, § 288.
- Missouri P. R. Co. v. White, 80 Tex. 202, 15 S. W. 808, §§ 193, 287.
- Mitchell v. Marr, 26 Tex. 329, §§ 179, 180, 183.
- Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705, 84 Tex. 303, 19 S. W. 477, §§ 138, 144, 159, 223, 224, 230, 303.
- Mitchell v. Nix, 1 Posey, Unrep. Cas. (Tex.) 126, §§ 28, 199, 256.
- Mitchell v. Wright, 4 Tex. 283, § 298.
- Mobley v. Leophart, 47 Ala. 257, § 35.
- Modisette v. National Bank (Tex. Civ. App.) 56 S. W. 1007, § 374.
- Moerlein v. Scottish Mortg. & Invest. Co. 9 Tex. Civ. App. 415, 29 S. W. 162, 948, §§ 129, 136.
- Moffatt v. Sydnor, 13 Tex. 628, § 180.
- Moke v. Brackett, 28 Tex. 443, § 390.
- Monday v. Vance, 11 Tex. Civ. App. 374, 32 S. W. 559, §§ 225, 284.
- Montgomery v. Brown, 1 Tex. App. Civ. Cas. (White & W.) § 1303, § 231.
- Montgomery v. Hornberger, 16 Tex. Civ. App. 28, 40 S. W. 628, § 108.
- Montgomery v. Noyes, 73 Tex. 203, 11 S. W. 138, § 240.
- Moody v. Butler, 63 Tex. 210, § 393.
- Moody v. Looscan (Tex. Civ. App.) 44 S. W. 621, § 372.
- Moody v. Smoot, 78 Tex. 119, 14 S. W. 285, §§ 116, 203, 390.
- Moor v. Moor (Tex. Civ. App.) 57 S. W. 992, §§ 91, 206, 278, 341, 353, 354, 361.
- Moore v. Dunn, 16 Tex. Civ. App. 371, 41 S. W. 530, § 272.
- Moore v. Johnson, 12 Tex. Civ. App. 694, 34 S. W. 771, § 270.
- Moore v. Moore (Tex. Civ. App.) 31 S. W. 532, § 167.
- Moore v. Moore (Tex. Civ. App.) 32 S. W. 161, S. C. 89 Tex. 29, 33 S. W. 217, § 373.
- Moore v. Moore, 22 Tex. 237, §§ 347, 352.
- Moore v. Moore, 59 Tex. 54, S. C. 67 Tex. 293, 3 S. W. 284, § 340.
- Moore v. Moore, 73 Tex. 383, 11 S. W. 396, § 340.
- Moore v. Linney, 2 Tex. Civ. App. 293, 21 S. W. 709, §§ 72, 108.
- Moore v. Wills, 69 Tex. 109, 5 S. W. 675, §§ 245, 247.
- Moreland v. Barnhart, 44 Tex. 275, § 247.
- Morey v. Morey, 82 Tex. 308, 17 S. W. 838, § 339.
- Morgan v. Davenport, 60 Tex. 230, § 163.
- Morgan v. Hughes, 20 Tex. 142, § 29.
- Morgan v. Morgan, 1 Posey, Unrep. Cas. (Tex.) 400, §§ 249, 252.
- Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154, §§ 16, 178, 362, 364.
- Morrill v. Hopkins, 36 Tex. 687, § 364.
- Morris v. Edwards, 1 Tex. App. Civ. Cas. (White & W.) § 548, § 37.
- Morris v. Geisecke, 60 Tex. 633, §§ 117, 259.
- Morris v. Hastings, 70 Tex. 26, 7 S. W. 649, §§ 146, 186.

Morris v. Turner, 5 Tex. Civ. App. 712, 24 S. W. 959, § 139.
Morrison v. Clark, 55 Tex. 437, § 93.
Moss v. Helsley, 60 Tex. 426, §§ 137, 160, 162.
Moursund v. Priess, 84 Tex. 554, 19 S. W. 775, § 268.
Muckelroy v. House, 21 Tex. Civ. App. 673, 52 S. W. 1038, § 248.
Mullins v. Weaver, 57 Tex. 5, § 108.
Mullins v. Yarborough, 44 Tex. 14, § 373.
Munk v. Weidner, 9 Tex. Civ. App. 491, 29 S. W. 409, § 74.
Murchison v. White, 54 Tex. 78, § 390.
Murphy v. Coffey, 33 Tex. 508, §§ 287, 290.
Murphy v. Reynaud, 2 Tex. Civ. App. 470, 21 S. W. 991, § 108.
Murray v. Murray, 66 Tex. 207, 18 S. W. 506, § 348.
Muse v. Burns, 3 Tex. App. Civ. Cas. (Willson) § 77, § 323.
Myers v. Evans, 81 Tex. 317, 16 S. W. 1060, § 258.

N.

Nanny v. Allen, 77 Tex. 240, 13 S. W. 989, § 372.
Nash v. George, 6 Tex. 234, § 50.
Nash v. Herring, 5 Tex. Civ. App. 95, 23 S. W. 739, § 270.
National Bank v. Kilgore, 17 Tex. Civ. App. 462, 43 S. W. 565, § 256.
Navarro v. State, 24 Tex. App. 378, 6 S. W. 542, § 305.
Needles v. Needles (Tex. Civ. App.) 54 S. W. 1070, § 341.
Neeley v. Case (Tex. Civ. App.) 32 S. W. 785, § 250.
Neiman v. Schuster (Tex. Civ. App.) 43 S. W. 1075, § 259.
Nelms v. Nagle (Tex. Civ. App.) 35 S. W. 60, § 392.
Nelson v. Frey, 4 Tex. App. Civ. Cas. (Willson) § 248, 16 S. W. 250, § 215.
Newcomb v. Newcomb, 38 Tex. 561, § 370.
Newcomer v. Orem, 2 Md. 297, 56 Am. Dec. 297, § 34.
Newland v. Holland, 45 Tex. 588, §§ 272, 374.
Newman v. Farquhar, 60 Tex. 640, §§ 134, 271.
New Orleans Ins. Asso. v. Jameson, 6 Tex. Civ. App. 282, 25 S. W. 307, § 269.
Newton v. Calhoun, 68 Tex. 451, 4 S. W. 645, § 270.
Newton v. Newton, 77 Tex. 508, 14 S. W. 157, §§ 287, 304, 321.
Neyland v. Bendy, 69 Tex. 711, 7 S. W. 497, § 243.
Nichols v. Dibrell, 61 Tex. 539, §§ 315, 318.
Nichols v. Gordon, 25 Tex. Supp. 109, §§ 107, 118.
Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947, § 153.
Nichols v. Oliver, 64 Tex. 654, §§ 379, 383.
Nichols v. Stewart, 15 Tex. 226, § 109.
Nickerson v. Nickerson, 65 Tex. 281, §§ 155, 193, 196, 283, 291, 325.
Nix v. Mayer (Tex.) 2 S. W. 819, §§ 249, 390.
Nixon v. Wichita Land & Cattle Co. 84 Tex. 408, 19 S. W. 560, §§ 13, 182, 200, 326, 344.
Noel v. Clark (Tex. Civ. App.) 60 S. W. 356, §§ 46, 70, 108, 129.
Nogees v. Nogees, 7 Tex. 538, §§ 341, 346.

Nolan v. Traber, 49 Md. 460, § 153.
 Norris v. Norris (Tex. Civ. App.) 46 S. W. 405, § 359.
 North v. James, 61 Miss. 761, § 311.
 Norton v. Davis, 83 Tex. 32, 18 S. W. 430, §§ 107, 108, 110, 284.

O.

O'Brien v. Hilburn, 9 Tex. 297, §§ 128, 281, 283.
 O'Brien v. Woeltz (Tex.) 58 S. W. 943, § 270.
 Ochoa v. Miller, 59 Tex. 460, § 119.
 O'Connor v. Vineyard, 91 Tex. 488, 44 S. W. 485, §§ 115, 220.
 Odum v. Menafee, 11 Tex. Civ. App. 119, 33 S. W. 129, §§ 262, 270.
 Ogden v. Giddings, 15 Tex. 485, § 217.
 O'Haley v. O'Haley, 31 Tex. 502, § 357.
 Oldham v. McIver, 49 Tex. 556, § 13.
 Oldham v. Medearis (Tex. Civ. App.) 40 S. W. 350, § 259.
 Oliver v. Robertson, 41 Tex. 422, § 208.
 Oppenheimer v. DeLopez (Tex. Civ. App.) 31 S. W. 826, § 376.
 Oppenheimer v. Fritter, 79 Tex. 99, 14 S. W. 1051, § 249.
 Oppenheimer v. Robinson, 87 Tex. 174, 27 S. W. 95, §§ 179, 180.
 Orrick v. Fort Worth (Tex. Civ. App.) 32 S. W. 443, § 260.
 Osborn v. Osborn, 62 Tex. 495, § 182.
 Osborn v. Osborn, 76 Tex. 494, 13 S. W. 538, § 374.
 Osborn v. Robinson (Tex. Civ. App.) 35 S. W. 327, §§ 376, 383.
 O'Shaughnessy v. Moore, 73 Tex. 108, 11 S. W. 153, S. C. 76 Tex. 605, 13 S. W. 570, § 262.
 Oury v. Saunders, 5 Tex. Civ. App. 310, 24 S. W. 341, § 310.
 Overton v. State, 43 Tex. 616, §§ 38, 305.
 Owen v. State, 7 Tex. App. 329, § 30.
 Owen v. Tankersley, 12 Tex. 405, § 299.
 Owens v. Hord, 14 Tex. Civ. App. 542, 37 S. W. 1093, S. C. on later appeal, 20 Tex. Civ. App. 21, 48 S. W. 200, §§ 232, 233.
 Owens v. New York & T. Land Co. 11 Tex. Civ. App. 284, 32 S. W. 189, 1057, §§ 37, 72, 131, 139, 321.

P.

Pace v. Pace, 19 Fla. 438, § 381.
 Pacific Exp. Co. v. Black, 8 Tex. Civ. App. 363, 27 S. W. 830, § 287.
 Palmer v. Coghlan (Tex. Civ. App.) 55 S. W. 1122, §§ 51, 54.
 Pape v. Pape, 13 Tex. Civ. App. 99, 35 S. W. 479, §§ 357, 359.
 Paris & G. N. R. Co. v. Greiner, 84 Tex. 443, 19 S. W. 564, § 290.
 Paris Exch. Bank v. Hulen, 21 Tex. Civ. App. 285, 52 S. W. 278, § 250.
 Parish v. Alston, 65 Tex. 194, § 313.
 Parker v. Chance, 11 Tex. 513, §§ 79, 80, 168, 183, 198.
 Parker v. Chancellor, 73 Tex. 475, 11 S. W. 503, § 107.
 Parker v. Coop, 60 Tex. 111, § 239.

- Parker v. Fogarty, 4 Tex. Civ. App. 615, 23 S. W. 700, §§ 223, 228.
Parker v. Newberry, 83 Tex. 428, 18 S. W. 815, § 200.
Parker v. Stephens (Tex. Civ. App.) 39 S. W. 164, § 392.
Parks v. Caudle, 58 Tex. 216, § 304.
Parks v. Willard, 1 Tex. 350, §§ 130, 213.
Parr v. Newby, 73 Tex. 468, 11 S. W. 490, § 247.
Parrish v. Frey, 18 Tex. Civ. App. 271, 44 S. W. 322, § 256.
Parrish v. Williams (Tex. Civ. App.) 53 S. W. 79, §§ 38, 191.
Paschall v. Pioneer Sav. & L. Co. 19 Tex. Civ. App. 102, 47 S. W. 98, § 264.
Patterson v. Allen, 50 Tex. 23, § 399.
Patton v. King, 26 Tex. 685, § 120.
Patty v. Middleton, 82 Tex. 586, 17 S. W. 909, §§ 149, 175, 233.
Paulson v. Paulson (Tex. Civ. App.) 21 S. W. 778, § 347.
Peak v. Brinson, 71 Tex. 310, 11 S. W. 269, § 41.
Peak v. Swindle, 68 Tex. 242, 4 S. W. 478, § 397.
Pearce v. Jackson, 61 Tex. 642, 646, 647, §§ 49, 81, 186, 223.
Pearson v. Cox, 71 Tex. 246, 9 S. W. 124, § 72.
Peavy v. Goss, 90 Tex. 90, 37 S. W. 317, § 289.
Peet v. Commerce & E. Street R. Co. 70 Tex. 522, 8 S. W. 203, § 183.
Pegues v. Haden, 76 Tex. 94, 13 S. W. 171, § 364.
Pellat v. Decker, 72 Tex. 578, 10 S. W. 696, § 257.
Pennsylvania F. Ins. Co. v. Wagley (Tex. Civ. App.) 36 S. W. 997, § 398.
Penny v. State (Tex. Crim. App.) 42 S. W. 297, § 305.
People's Bldg. Loan & Sav. Asso. v. Dailey, 17 Tex. Civ. App. 38, 42 S. W. 364, §§ 129, 262.
Perkins v. Baker, 38 Tex. 45, §§ 46, 60.
Peters v. Clements, 46 Tex. 114, § 217.
Peters v. Peters, 42 Iowa, 182, § 155.
Pfeiffer v. McNatt, 74 Tex. 640, 12 S. W. 821, § 253.
Phelan v. Boyd (Tex.) 14 S. W. 290, § 254.
Phelps v. Brackett, 24 Tex. 236, § 301.
Philipowski v. Spencer, 63 Tex. 604, § 139.
Philleo v. Holliday, 24 Tex. 38, §§ 137, 160.
Philleo v. Smalley, 23 Tex. 503, § 246.
Phillips v. Phillips (Tex. Civ. App.) 57 S. W. 59, §§ 81, 163.
Phillips v. Price, 12 Tex. Civ. App. 408, 34 S. W. 784, § 374.
Phillips v. Warner, 4 Tex. App. Civ. Cas. (Willson) § 147, 16 S. W. 423, §§ 252, 254.
Phœnix F. & M. Ins. Co. v. Shoemaker, 95 Tenn. 72, 31 S. W. 270, § 303.
Phœnix Ins. Co. v. Neal (Tex. Civ. App.) 56 S. W. 91, § 207.
Pierce v. Fort, 60 Tex. 464, §§ 113, 114.
Pierce v. Pierce, 71 N. Y. 154, § 277.
Pile v. Pile, 94 Ky. 308, 22 S. W. 215, § 335.
Pinkard v. Pinkard, 14 Tex. 356, §§ 334, 335.
Pioneer Bldg. & L. Asso. v. Everheart, 18 Tex. Civ. App. 192, 44 S. W. 885, § 263.
Pioneer Sav. & L. Asso. v. Edwards, 12 Tex. Civ. App. 556, 34 S. W. 193, § 263.

- Pioneer Sav. & L. Co. v. Dougherty (Tex. Civ. App.) 35 S. W. 698, § 264.
Pioneer Sav. & L. Co. v. Paschall, 12 Tex. Civ. App. 613, 34 S. W. 1001, § 264.
Pitner v. Flanagan, 17 Tex. 7, § 368.
Pitt v. Elser, 7 Tex. Civ. App. 43, 32 S. W. 146, § 71.
Pittam v. Foster, 1 Barn. & C. 248, § 312.
Pitts v. Elsler, 87 Tex. 347, 28 S. W. 518, § 71.
Pool v. Chase, 46 Tex. 207, §§ 112-114.
Poor v. Boyce, 12 Tex. 440, §§ 44, 94.
Porter v. Chronister, 58 Tex. 53, § 198.
Portis v. Parker, 22 Tex. 699, §§ 169, 173, 203.
Portwood v. Newberry, 79 Tex. 337, 15 S. W. 270, § 270.
Posey v. Bass, 77 Tex. 512, 14 S. W. 156, § 250.
Potter v. Kennedy (Tex. Civ. App.) 41 S. W. 711, § 192.
Powers v. Parks (Tex. Civ. App.) 33 S. W. 718, § 317.
Prather v. Wilkins, 68 Tex. 187, 4 S. W. 252, § 243.
Pratt v. Godwin, 61 Tex. 331, §§ 201, 385.
Presidio Min. Co. v. Bullis, 68 Tex. 581, 4 S. W. 860, § 182.
Presnall v. McLeary (Tex. Civ. App.) 50 S. W. 1066, § 115.
Pressler v. Wilke, 84 Tex. 344, 19 S. W. 436, § 387.
Pressley v. Robinson, 57 Tex. 453, § 372.
Price v. Cole, 35 Tex. 461, §§ 88, 89, 283.
Pridgen v. Warn, 79 Tex. 588, 15 S. W. 559, §§ 250, 265.
Primm v. Barton, 18 Tex. 206, § 394.
Proetzel v. Rabel, 21 Tex. Civ. App. 559, 54 S. W. 373, § 312.
Proetzel v. Schroeder, 83 Tex. 684, 19 S. W. 292, §§ 49, 172, 278.
Prufrock v. Joseph (Tex. Civ. App.) 27 S. W. 264, § 270.
Pryor v. Pendleton, 92 Tex. 384, 47 S. W. 706, 49 S. W. 212, § 162.
Pryor v. Stone, 19 Tex. 371, § 249.
Pucket v. Johnson, 45 Tex. 550, § 387.
Purdom v. Boyd, 82 Tex. 130, 17 S. W. 606, §§ 116, 141, 145, 146.
Purinton v. Davis, 66 Tex. 455, 1 S. W. 343, §§ 282, 298.
Purinton v. Gunter, 3 Tex. Civ. App. 525, 22 S. W. 350, 1008, §§ 182, 232.
Putnam v. Young, 57 Tex. 461, § 372.

Q.

- Qualls v. Sayles, 18 Tex. Civ. App. 400, 45 S. W. 839, § 289.
Queens Ins. Co. v. May (Tex. Civ. App.) 35 S. W. 829, §§ 105, 177, 219.

R.

- Ragsdale v. Barnes, 68 Tex. 504, 5 S. W. 68, § 308.
Ragsdale v. Groos (Tex. Civ. App.) 51 S. W. 256, § 118.
Rainey v. Chambers, 56 Tex. 17, § 373.
Rains v. Herring, 68 Tex. 473, 5 S. W. 369, § 298.
Rains v. Wheeler, 76 Tex. 390, 13 S. W. 324, § 91.

- Randall v. Snyder**, 64 Tex. 350, § 340.
Randall v. Texas C. R. Co. 63 Tex. 586, § 260.
Randolph v. Junker, 1 Tex. Civ. App. 517, 21 S. W. 551, § 395.
Ranney v. Miller, 51 Tex. 263, § 135.
Ratto v. Holland, 2 Tex. App. Civ. Cas. (Willson) § 470, §§ 146, 231.
Raymond v. Cook, 31 Tex. 374, § 93.
Read v. Allen, 56 Tex. 176, §§ 139, 321.
Reagan v. Holliman, 34 Tex. 403, §§ 41, 128.
Reddin v. Smith, 65 Tex. 26, § 286.
Redding v. Boyd, 64 Tex. 498, § 372.
Redlick v. Williams (Tex.) 5 S. W. 375, § 266.
Reece v. Renfro, 68 Tex. 192, 4 S. W. 545, § 270.
Reed v. Talley, 13 Tex. Civ. App. 286, 35 S. W. 805, § 159.
Reed v. West, 47 Tex. 248, § 311.
Reeves v. Petty, 44 Tex. 249, § 378.
Reeves v. Steele, 2 Head, 647, § 381.
Reinstein v. Daniels, 75 Tex. 640, 13 S. W. 21, §§ 247, 272.
Republic v. Skidmore, 2 Tex. 261, § 28.
Republic v. Young, Dallam (Tex.) 464, § 28.
Reynolds v. Lansford, 16 Tex. 287, §§ 79, 93, 210, 213.
Reynolds v. Reynolds, 3 Allen, 605, § 331.
Rhine v. Blake, 59 Tex. 240, § 188.
Rhine v. Hodge, 1 Tex. Civ. App. 368, 21 S. W. 140, § 112.
Rhodes v. Alexander, 19 Tex. Civ. App. 552, 47 S. W. 754, §§ 180, 182, 232.
Rhodes v. Gibbs, 39 Tex. 432, §§ 46, 75, 99, 123, 300.
Rice v. Mexican Nat. R. Co. 8 Tex. Civ. App. 130, 27 S. W. 921, §§ 287, 310.
Rice v. Peacock, 37 Tex. 392, § 108.
Rice v. Rice, 21 Tex. 58, §§ 205, 353, 356, 359.
Rice v. Rice, 31 Tex. 174, §§ 2, 8, 347.
Rice v. Scottish-American Mortg. Co. (Tex. Civ. App.) 30 S. W. 75, § 396.
Richards v. Nelms, 38 Tex. 445, § 251.
Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, § 279.
Richardson v. Hutchins, 68 Tex. 81, 3 S. W. 276, §§ 38, 79, 82, 85, 151.
Richardson v. Overleese, 17 Tex. Civ. App. 376, 44 S. W. 308, § 384.
Riley v. Wilson, 86 Tex. 240, 24 S. W. 394, §§ 79, 86, 91, 113.
Rios v. State, 39 Tex. Crim. Rep. 675, 47 S. W. 987, § 305.
Robb v. Robb (Tex. Civ. App.) 41 S. W. 92, § 206.
Robbins v. Island City Sav. Bank, 3 Tex. App. Civ. Cas. (Willson) § 247, § 63.
Roberson v. Roberson, 2 Posey, Unrep. Cas. (Tex.) 451, §§ 335, 347.
Robert v. Ezell, 11 Tex. Civ. App. 176, 32 S. W. 362, § 130.
Roberts v. Frisby, 38 Tex. 219, § 91.
Roberts v. Trout, 13 Tex. Civ. App. 70, 25 S. W. 323, § 199.
Robertson v. Cole, 12 Tex. 356, §§ 15, 332.
Robertson v. Paul, 16 Tex. 472, § 382.
Robinson v. Kampman, 5 Tex. Civ. App. 605, 24 S. W. 529, § 311.

- Robinson v. Moore, 1 Tex. Civ. App. 93, 20 S. W. 994, § 205.
 Roche v. Lovell, 74 Tex. 191, 11 S. W. 1079, § 385.
 Roe v. Dailey, 1 Posey, Unrep. Cas. (Tex.) 248, § 233.
 Rogan v. Williams, 63 Tex. 123, § 216.
 Rogers v. Ragland, 42 Tex. 422, § 373.
 Rogers v. Renshaw, 37 Tex. 625, § 259.
 Rogers v. Roberts, 13 Tex. Civ. App. 190, 35 S. W. 76, § 101.
 Rogers v. Trevathan, 67 Tex. 406, 3 S. W. 569, § 162.
 Rollins v. O'Farrell, 77 Tex. 90, 13 S. W. 1021, §§ 266, 270.
 Roots v. Robertson, 93 Tex. 365, 55 S. W. 308, §§ 372-374.
 Rork v. Shields, 16 Tex. Civ. App. 640, 42 S. W. 1032, § 108.
 Rose v. Blankenship (Tex.) 18 S. W. 101, §§ 247, 262.
 Rose v. Houston, 11 Tex. 324, §§ 27, 182, 223, 224, 231.
 Rosenbaum v. Harloe, 1 Tex. App. Civ. Cas. (White & W.) §§ 849, 850, §§ 298, 300.
 Ross v. Kornrumpf, 64 Tex. 390, § 239.
 Ross v. O'Neil, 45 Tex. 599, § 399.
 Roundtree v. Thomas, 32 Tex. 286, § 50.
 Routh v. Routh, 57 Tex. 589, § 177.
 Roy v. Clarke, 75 Tex. 28, 12 S. W. 845, § 259.
 Roy v. Whitaker, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367, § 364.
 Rudd v. Johnson, 60 Tex. 91, § 198.
 Ruiz v. Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295, §§ 57, 234.
 Ruleman v. Pritchett, 56 Tex. 482, § 108.
 Runge v. Sabin (Tex. Civ. App.) 30 S. W. 568, § 108.
 Runnels v. Runnels, 27 Tex. 515, §§ 372, 374.
 Russell v. Nall, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901, § 270.
 Russell v. Randolph, 11 Tex. 460, § 28.
 Ryan v. Maxey, 43 Tex. 192, § 132.
 Ryan v. Ryan, 61 Tex. 473, § 283.

S.

- Sackrider v. Sackrider, 60 Iowa, 397, 14 N. W. 736, § 334.
 St. Louis Brewing Asso. v. Walker (Tex. Civ. App.) 54 S. W. 360, § 253.
 St. Louis S. W. R. Co. v. Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741, § 287.
 Sample v. Irwin, 45 Tex. 567, § 111.
 Sampson v. Williamson, 6 Tex. 102, § 262.
 Samuelson v. Bridges, 6 Tex. Civ. App. 425, 25 S. W. 636, §§ 205, 216.
 San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496, §§ 267, 295.
 San Antonio v. Grandjean, 91 Tex. 430, 41 S. W. 477, 44 S. W. 476, §§ 78, 131.
 San Antonio & A. P. R. Co. v. Belt (Tex. Civ. App.) 59 S. W. 607, § 193.
 San Antonio & A. P. R. Co. v. Corley (Tex. Civ. App.) 26 S. W. 903, S. C. 87 Tex. 432, 29 S. W. 231, § 286.
 San Antonio & A. P. R. Co. v. Flato, 13 Tex. Civ. App. 214, 35 S. W. 859, §§ 229, 286, 299.

- San Antonio & A. P. R. Co. v. Gillum* (Tex. Civ. App.) 30 S. W. 697 (Tex.) 31 S. W. 356, §§ 284, 298.
- San Antonio Street R. Co. v. Cailloutte*, 79 Tex. 341, 15 S. W. 390, § 285.
- San Antonio Street R. Co. v. Helm*, 64 Tex. 147, §§ 286, 287.
- Sanburn v. Deal*, 3 Tex. Civ. App. 385, 22 S. W. 192, §§ 205, 270, 365.
- Sanburn v. Schuler*, 3 Tex. Civ. App. 629, 22 S. W. 119, § 395.
- Sanders v. Sheran*, 66 Tex. 655, 2 S. W. 804, § 270.
- Sanger v. Moody*, 60 Tex. 96, §§ 392, 395.
- Sanger Bros. v. Hicks Co.* 22 Tex. Civ. App. 473, 56 S. W. 775, § 262.
- Sapp v. Newsom*, 27 Tex. 537, § 8.
- Sapp v. Sapp*, 71 Tex. 348, 9 S. W. 258, § 334.
- Saunders v. Isbell*, 5 Tex. Civ. App. 513, 24 S. W. 307, §§ 175, 395.
- Scales v. Johnson* (Tex. Civ. App.) 41 S. W. 828, §§ 41, 139.
- Scales v. Marshall* (Tex. Civ. App.) 60 S. W. 336, §§ 180, 181, 183, 184.
- Schepflin v. Small*, 4 Tex. Civ. App. 493, 23 S. W. 432, §§ 188, 225.
- Schister v. L. Bauman Jewelry Co.* 79 Tex. 179, 15 S. W. 259, § 228.
- Schmeltz v. Garey*, 49 Tex. 49, §§ 183, 232.
- Schmick v. Bateman*, 77 Tex. 326, 14 S. W. 22, § 207.
- Schmidt v. Huppmann*, 73 Tex. 112, 11 S. W. 175, § 206.
- Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638, § 309.
- Schneider v. Bray*, 59 Tex. 668, §§ 247, 381.
- Schneider v. Campbell*, 1 Tex. Civ. App. 314, 21 S. W. 55, § 253.
- Schneider v. Fowler*, 1 Tex. App. Civ. Cas. (White & W.) §§ 856-858. §§ 180, 212, 223, 232.
- Schuster v. L. Bauman Jewelry Co.* 79 Tex. 179, 15 S. W. 259, § 69.
- Schwartzman v. Cabell* (Tex. Civ. App.) 49 S. W. 113, §§ 180, 205, 270.
- Schwarz v. Allen* (Tex. Civ. App.) 37 S. W. 986, § 19.
- Schwarz v. National Bank*, 67 Tex. 217, 2 S. W. 865, § 133.
- Schwarzhoff v. Necker*, 1 Posey, Unrep. Cas. (Tex.) 325, § 272.
- Schwulst v. Neely* (Tex. Civ. App.) 50 S. W. 608, § 298.
- Scoby v. Sweatt*, 28 Tex. 713, § 127.
- Scott v. Cunningham*, 60 Tex. 566, § 373.
- Scott v. Maynard. Dallam* (Tex.) 548, §§ 116, 168.
- Scott v. Parks* (Tex. Civ. App.) 29 S. W. 216, § 270.
- Scott v. Scott*, 61 Tex. 119, § 334.
- Scottish-American Mortg. Co. v. Massie* (Tex.) 60 S. W. 544, § 224.
- Scottish-American Mortg. Co. v. Scripture* (Tex. Civ. App.) 40 S. W. 210, §§ 129, 136.
- Scripture v. Scottish-American Mortg. Co.* 20 Tex. Civ. App. 153, 49 S. W. 644, § 262.
- Searcy v. Mealler*, 1 Tex. App. Civ. Cas. (White & W.) § 929, § 300.
- Sears v. Sears*, 45 Tex. 557, §§ 272, 374.
- Seay v. Fennell*, 15 Tex. Civ. App. 261, 39 S. W. 181, §§ 134, 262.
- Seligson v. Staples*, 1 Tex. App. Civ. Cas. (White & W.) § 1071, § 187.
- Shanks v. Dupont*, 3 Pet. 242, 7 L. ed. 666, § 28.
- Shannon v. Gray*, 59 Tex. 252, §§ 372, 392.
- Shannon v. Taylor*, 16 Tex. 413, § 64.
- Sharman v. Sharman*, 18 Tex. 521, §§ 328, 334, 335, 337.

- Sharpe v. Johnston** (Tex.) 19 S. W. 259, § 247.
Sheffield v. Sheffield, 3 Tex. 79, § 334.
Shelby v. Burtis, 18 Tex. 644, §§ 48, 113, 123.
Shelby v. Perrin, 18 Tex. 515, § 293.
Shepherd v. Cassiday, 20 Tex. 24, § 270.
Sherring v. Augustus, 11 Tex. Civ. App. 194, 32 S. W. 450, § 259.
Shields v. Aultman, 20 Tex. Civ. App. 345, 50 S. W. 219, § 259.
Shilling v. Shilling (Tex. Civ. App.) 35 S. W. 420, § 304.
Shook v. Shook, 21 Tex. Civ. App. 177, 50 S. W. 731, § 270.
Short v. Short, 12 Tex. Civ. App. 86, 33 S. W. 682, § 184.
Shreck v. Shreck, 32 Tex. 578, 590, § 334.
Siese v. Malsch, 54 Tex. 355, §§ 50, 398.
Sigal v. Miller (Tex. Civ. App.) 25 S. W. 1012, § 320.
Silberberg v. Trilling, 82 Tex. 523, 18 S. W. 591, § 254.
Silverman v. Landrum (Tex. Civ. App.) 56 S. W. 107, § 252.
Simmons v. Blanchard, 46 Tex. 266, § 390.
Simmons v. Simmons (Tex. Civ. App.) 39 S. W. 639, § 19.
Simon v. State, 31 Tex. Crim. Rep. 186, 20 S. W. 399, 716, §§ 9, 10, 303.
Simons v. Simons, 13 Tex. 468, §§ 347, 351.
Simons v. Simons, 23 Tex. 344, §§ 353, 359.
Simonton v. Mayblum, 59 Tex. 7, § 310.
Simpson v. Brotherton, 62 Tex. 170, § 287.
Simpson v. Edens, 14 Tex. Civ. App. 235, 38 S. W. 474, §§ 108, 120.
Simpson v. Gregg, 1 Posey, Unrep. Cas. (Tex.) 380, § 364.
Simpson v. Simpson, 94 Ky. 586, 23 S. W. 361, § 277.
Simpson v. Texas Tram & Lumber Co. (Tex. Civ. App.) 51 S. W. 655, § 232.
Sims v. State, 30 Tex. App. 605, 18 S. W. 410, § 306.
Sinsheimer v. Kahn, 6 Tex. Civ. App. 143, 24 S. W. 533, § 60.
Slator v. Neal, 64 Tex. 222, § 105.
Slavin v. Wheeler, 61 Tex. 654, § 256.
Sloan v. Webb, 20 Tex. 189, § 369.
Smith v. Bailey, 66 Tex. 553, 1 S. W. 627, §§ 142, 145, 182.
Smith v. Boquet, 27 Tex. 507, §§ 79, 182.
Smith v. Butler, 85 Tex. 126, 19 S. W. 1083, §§ 160, 162.
Smith v. Charter Oak L. Ins. Co. 64 Mo. 330, § 311.
Smith v. Chenault, 48 Tex. 455, § 252.
Smith v. Elliott, 39 Tex. 201, § 117.
Smith v. McElyea, 68 Tex. 70, 3 S. W. 258, § 310.
Smith v. Powell, 5 Tex. Civ. App. 373, 23 S. W. 1109, §§ 37, 234.
Smith v. Redden, 1 Posey, Unrep. Cas. (Tex.) 360, § 307.
Smith v. Smith, 1 Tex. 621, §§ 8, 16, 26.
Smith v. Strahan, 16 Tex. 314, §§ 79, 184.
Smith v. Strahan, 25 Tex. 103, § 85.
Smith v. Tripis, 2 Tex. Civ. App. 267, 21 S. W. 722, § 37.
Smith v. Uzzell, 56 Tex. 315, § 271.
Smith v. Uzzell, 61 Tex. 220, § 310.

- Smith v. Von Hutton, 75 Tex. 625, 13 S. W. 18, §§ 262, 396.
Smith v. Wilson (Tex. Civ. App.) 32 S. W. 434, § 70.
Smitheal v. Smith, 10 Tex. Civ. App. 446, 31 S. W. 422, § 147.
Smotridge v. Lovell, 35 Tex. 58, §§ 46, 60, 61.
Solomon v. Skinner, 82 Tex. 345, 18 S. W. 698, § 399.
Solyer v. Romanet, 52 Tex. 502, §§ 108, 112.
Sorrel v. Clayton, 42 Tex. 188, § 105.
Sossaman v. Powell, 21 Tex. 664, § 373.
Southwestern Mfg. Co. v. Swan (Tex. Civ. App.) 43 S. W. 813, §§ 354, 355.
Southwestern Teleg. & Teleph. Co. v. Dale (Tex. Civ. App.) 27 S. W. 1059, § 299.
Soye v. McCallister, 18 Tex. 80, §§ 372, 390.
Sproulle v. McFarland (Tex. Civ. App.) 56 S. W. 693, § 264.
Spruill v. Spruill, 1 Posey, Unrep. Cas. (Tex.) 244, § 334.
Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868, § 277.
Stafford v. Stafford, 41 Tex. 111, §§ 12, 81, 349.
Stallings v. Hullum, 79 Tex. 421, 15 S. W. 677, § 150.
Stallings v. Hullum, 89 Tex. 431, 35 S. W. 2, §§ 258, 259.
Stansbury v. Nichols, 30 Tex. 145, §§ 46, 57-60.
Starnes v. Beitel, 20 Tex. Civ. App. 524, 50 S. W. 202, §§ 110, 262.
State v. Barrow, 14 Tex. 179, §§ 27, 28.
State v. Jordan (Tex. Civ. App.) 59 S. W. 826, § 373.
State v. Shreve, 137 Mo. 1, 38 S. W. 548, § 306.
State ex rel. Crow v. Hostetter, 137 Mo. 636, 38 L. R. A. 208, 39 S. W. 270, § 33.
State ex rel. Huber v. King, 49 La. Ann. 1503, 22 So. 887, § 357.
State Bank v. Stephenson Mfg. Co. 4 Tex. Civ. App. 137, 23 S. W. 234, § 217.
Steed v. Petty, 65 Tex. 490, § 128.
Steel v. Metcalf, 4 Tex. Civ. App. 313, 23 S. W. 474, § 286.
Steinback v. Weill, 1 Tex. App. Civ. Cas. (White & W.) §§ 934, 935, §§ 141, 296.
Stephens v. Matthews, 69 Tex. 341, 6 S. W. 567, § 116.
Stephens v. Shaw, 68 Tex. 261, 4 S. W. 458, §§ 63, 101, 364.
Stephens v. Stephens, 62 Tex. 337, § 361.
Stephenson v. Chappell, 12 Tex. Civ. App. 296, 23 S. W. 880, 36 S. W. 482, § 179.
Stephenson v. Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383, §§ 132, 373, 386.
Stephenson v. Yeargan, 17 Tex. Civ. App. 111, 42 S. W. 626, § 129.
Steward v. State, 7 Tex. App. 326, § 5.
Stewart v. Mackey, 16 Tex. 56, § 262.
Stiles v. Japhet, 84 Tex. 91, 19 S. W. 450, §§ 87, 180, 183.
Stockstill v. Bart, 47 Fed. 231, § 216.
Stoker v. Bailey, 62 Tex. 299, § 239.
Stoker v. Patton (Tex. Civ. App.) 35 S. W. 64, §§ 12, 262.
Stone v. Ellis, 69 Tex. 325, 7 S. W. 349, § 392.

- Stone v. Sledge (Tex. Civ. App.) 24 S. W. 697, 87 Tex. 49, 26 S. W. 1086, §§ 108, 110, 119, 128, 136.
 Stone v. Stone (Tex. Civ. App.) 40 S. W. 1022, §§ 354, 357, 358.
 Storer v. Lane, 1 Tex. Civ. App. 250, 20 S. W. 852, §§ 310, 311.
 Storrie v. Woessner (Tex. Civ. App.) 47 S. W. 837, S. C. (Tex.) 51 S. W. 1132, § 267.
 Story v. Marshall, 24 Tex. 305, §§ 79, 81, 217.
 Stramler v. Coe, 15 Tex. 211, §§ 147, 394.
 Stringfellow v. Sorrells, 82 Tex. 277, 18 S. W. 689, §§ 185, 221.
 Stuart v. Baker, 17 Tex. 417, § 64.
 Summerhill v. Darrow (Tex.) 57 S. W. 942, § 12.
 Sutherland v. Williams (Tex.) 11 S. W. 1067, § 264.
 Sutton v. Harvey (Tex. Civ. App.) 57 S. W. 879, § 160.
 Swayne v. Chase (Tex. Civ. App.) 29 S. W. 420, § 365.
 Swearingen v. Bassett, 65 Tex. 267, §§ 250, 252.
 Swearingen v. Reed, 2 Tex. Civ. App. 364, 21 S. W. 383, §§ 79, 82, 218.
 Swink v. League, 6 Tex. Civ. App. 309, 25 S. W. 807, §§ 180, 182.
 Swope v. Stantzenberger, 59 Tex. 387, § 248.

T.

- Tackaberry v. City Nat. Bank, 85 Tex. 488, 22 S. W. 151, 299, §§ 253, 262.
 Tadlock v. Eccles, 20 Tex. 782, § 381.
 Talkin v. Anderson (Tex.) 19 S. W. 350, § 136.
 Tarkington v. Brunett (Tex. Civ. App.) 51 S. W. 274, § 289.
 Tarlton v. Weir, 1 Tex. App. Civ. Cas. (White & W.) § 145, § 323.
 Tarpley v. Poage, 2 Tex. 139, § 12.
 Taylor v. Barrow, 2 Posey, Unrep. Cas. (Tex.) 689, § 397.
 Taylor v. Bland, 60 Tex. 29, § 310.
 Taylor v. Bonnett, 38 Tex. 521, §§ 46, 296.
 Taylor v. Boulware, 17 Tex. 74, § 250.
 Taylor v. Hall, 20 Tex. 211, § 118.
 Taylor v. Harris, 21 Tex. 438, § 319.
 Taylor v. Murphy, 50 Tex. 291, §§ 203, 296, 317, 323.
 Taylor v. Prendergast (Tex. Civ. App.) 29 S. W. 87, § 254.
 Taylor v. Stephens, 17 Tex. Civ. App. 36, 42 S. W. 1048, §§ 316, 317.
 Taylor v. Taylor (Tex. Civ. App.) 26 S. W. 889, § 376.
 Taylor v. Taylor, 18 Tex. 574, §§ 333, 334.
 Teal v. Sevier, 26 Tex. 516, § 138.
 Telschow v. House, 10 Tex. Civ. App. 671, 32 S. W. 153, §§ 380, 382.
 Tenney v. Wessell (Tex. Civ. App.) 26 S. W. 436, § 247.
 Terry v. Barbour, 5 Tex. Civ. App. 474, 24 S. W. 381, § 134.
 Terry v. Terry, 39 Tex. 310, § 372.
 Tevis v. Collier, 84 Tex. 638, 19 S. W. 801, § 310.
 Texas & N. O. R. Co. v. Speights (Tex. Civ. App.) 59 S. W. 572, § 197.
 Texas & P. R. Co. v. Alexander, 13 Tex. Civ. App. 313, 35 S. W. 9, § 292.
 Texas & P. R. Co. v. Bailey, 83 Tex. 19, 18 S. W. 481, §§ 31, 193, 292.

- Texas & P. R. Co. v. Durrett, 57 Tex. 48, § 37.
 Texas & P. R. Co. v. Fuller, 13 Tex. Civ. App. 151, 36 S. W. 319, § 287.
 Texas & P. R. Co. v. Gwaltney, 2 Tex. App. Civ. Cas. (Willson) § 684, § 287.
 Texas & P. R. Co. v. Medaris, 64 Tex. 92, §§ 229, 286.
 Texas & P. R. Co. v. Pollard, 2 Tex. App. Civ. Cas. (Willson) § 401, § 287.
 Texas & P. R. Co. v. Watkins (Tex. Civ. App.) 26 S. W. 760, Aff'd, 88 Tex. 20, 29 S. W. 232, §§ 284, 287.
 Texas & St. L. R. Co. v. Reid, 1 Tex. App. Civ. Cas. (White & W.) § 206, § 194.
 Texas C. R. Co. v. Burnett, 61 Tex. 638, § 193.
 Texas Ins. & Bkg. Co. v. Turnley, 61 Tex. 365, § 39.
 Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S. W. 12, § 129.
 Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399, § 262.
 Texas Trunk R. Co. v. Hall (Tex. Civ. App.) 24 S. W. 324, §§ 37, 130.
 Therriault v. Compere (Tex. Civ. App.) 47 S. W. 750, §§ 37, 105, 207.
 Thomas v. Chance, 11 Tex. 634, § 116.
 Thomas v. Quarles, 64 Tex. 491, § 321.
 Thomas v. Williams, 50 Tex. 269, § 133.
 Thompson v. Cragg, 24 Tex. 582, 597, 602, §§ 159, 313, 381.
 Thompson v. Hervey, 2 Tex. App. Civ. Cas. (Willson) §§ 506, 507, § 90.
 Thompson v. Johnson, 84 Tex. 548, 19 S. W. 784, §§ 108, 111.
 Thompson v. Jones, 60 Tex. 94, § 295.
 Thompson v. Wilson (Tex. Civ. App.) 60 S. W. 354, § 232.
 Thompson Sav. Bank v. Gregory (Tex. Civ. App.) 50 S. W. 622, § 129.
 Throckmorton v. Pence, 121 Mo. 50, 25 S. W. 843, § 311.
 Tiebout v. Millican, 61 Tex. 514, § 373.
 Timmins v. Lacy, 30 Tex. 115, §§ 3, 5.
 Tipton v. Thompson, 21 Tex. Civ. App. 143, 50 S. W. 641, § 289.
 Todd, Ex parte, 119 Cal. 57, 50 Pac. 1071, § 357.
 Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 293, § 35.
 Tolman v. Leonard, 6 App. D. C. 224, § 357.
 Tompkins v. Williams, 7 Tex. Civ. App. 602, 25 S. W. 158, §§ 34, 179, 180, 182, 232.
 Torres v. Cuneo (Tex. Civ. App.) 53 S. W. 828, § 270.
 Torrey v. Cameron, 73 Tex. 583, 11 S. W. 840, §§ 88, 90, 230, 239.
 Trammell v. Neal, 1 Posey, Unrep. Cas. (Tex.) 51, §§ 308, 374.
 Travis County v. Trogdon (Tex. Civ. App.) 29 S. W. 405, § 287.
 Trawick v. Harris, 8 Tex. 312, §§ 272, 374.
 Trevino v. Trevino, 54 Tex. 261, § 342.
 Trevino v. Trevino, 63 Tex. 650, §§ 283, 357.
 Trigg v. Trigg (Tex.) 18 S. W. 314, §§ 345, 355.
 Trimble v. Miller, 24 Tex. 214, §§ 46, 60, 70, 300, 318.
 Trimble v. Trimble, 15 Tex. 18, §§ 353, 359.
 Trousdale v. Trousdale, 35 Tex. 756, § 369.
 Tucker v. Brackett, 28 Tex. 337, §§ 384, 390.
 Tucker v. Carr, 39 Tex. 98, §§ 118, 182.
 Turnley v. Texas Banking & Ins. Co. 54 Tex. 451, §§ 286, 302.

U.

Ullmann v. Jasper, 70 Tex. 446, 7 S. W. 763, §§ 69, 228.

Urquhart v. Womack, 53 Tex. 616, §§ 280, 322.

V.

Van Bibber v. Mathis, 52 Tex. 406, § 93.

Van Ratcliff v. Call, 72 Tex. 491, 10 S. W. 578, § 247.

Veramendi v. Hutchins, 48 Tex. 531, §§ 180, 392, 393.

Votaw v. Pettigrew, 15 Tex. Civ. App. 87, 38 S. W. 215, § 199.

W.

Wadkins v. Watson, 86 Tex. 194, 22 L. R. A. 779, 24 S. W. 385, §§ 68, 125, 128.

Waggoner v. Haskell, 89 Tex. 435, 35 S. W. 1, §§ 249, 250, 253.

Walker v. Abercrombie, 61 Tex. 69, §§ 398, 399.

Walker v. House (Tex. Civ. App.) 24 S. W. 82, §§ 124, 263.

Walker v. Howard, 34 Tex. 478, § 392.

Walker v. Stringfellow, 30 Tex. 570, § 105.

Wall v. Clark, 19 Tex. 321, § 390.

Wallace v. Campbell, 54 Tex. 87, § 233.

Wallace v. Finberg, 46 Tex. 35, §§ 141, 143, 284.

Walling v. Hannig, 73 Tex. 580, 11 S. W. 547, §§ 50, 56, 294.

Waltee v. Weaver, 57 Tex. 569, § 112.

Walters v. Jewett, 28 Tex. 192, § 116.

Walters v. Texas Bldg. & L. Asso. (Tex. Civ. App.) 29 S. W. 51, §§ 263, 264.

Ward v. West (Tenn. Ch. App.) 35 S. W. 563, § 293.

Wardlow v. Miller, 69 Tex. 395, 6 S. W. 292, §§ 64, 136.

Warfield, Ex parte (Tex. Crim. App.) 50 S. W. 933, § 291.

Warhmund v. Merritt, 60 Tex. 24, § 265.

Warren v. Dickerson, 3 Tex. 460, §§ 130, 213.

Warren v. Jones, 69 Tex. 462, 6 S. W. 775, §§ 120, 122.

Warren v. Smith, 44 Tex. 245, § 37.

Wartelsky v. McGee, 10 Tex. Civ. App. 220, 30 S. W. 69, §§ 196, 289.

Washington v. State, 17 Tex. App. 197, § 305.

Washington L. Ins. Co. v. Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123, §§ 75, 227, 312.

Watkins v. Davis, 61 Tex. 414, § 247.

Watkins v. Hall, 57 Tex. 1, §§ 108, 381, 392.

Watkins v. Sproull, 8 Tex. Civ. App. 427, 28 S. W. 356, § 259.

Watson v. Rainey, 69 Tex. 319, 6 S. W. 840, § 380.

Watts v. Miller, 76 Tex. 13, 13 S. W. 16, §§ 262, 372, 381, 392.

Webb v. Burney, 70 Tex. 322, 7 S. W. 841, §§ 113, 114, 149.

Webster v. Willis, 56 Tex. 468, § 399.

- Weir v. Smith, 62 Tex. 1, § 160.
- Weir Plow Co. v. Carroll, 4 Tex. App. Civ. Cas. (Willson) § 178, 15 S. W. 123, § 90.
- Welborne v. Downing, 73 Tex. 527, 11 S. W. 501, § 270.
- Welder v. Lambert, 91 Tex. 510, 44 S. W. 281, §§ 184, 205, 206, 215.
- Wellborn v. Odd Fellows' Bldg. & Exch. Co. 56 Tex. 501, § 92.
- Wells v. Cockrum, 13 Tex. 127, §§ 62, 310.
- Wells v. Petree, 39 Tex. 420, § 162.
- Wenar v. Stenzel, 48 Tex. 484, §§ 363, 392.
- West v. West, 9 Tex. Civ. App. 475, 29 S. W. 242, §§ 365, 372, 373.
- Westbrooks v. Jeffers, 33 Tex. 90, § 312.
- West End Town Co. v. Grigg (Tex. Civ. App.) 54 S. W. 904, § 264.
- Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 1 L. R. A. 728, 9 S. W. 598, § 287.
- Western U. Teleg. Co. v. Hearne (Tex. Civ. App.) 40 S. W. 50, § 120.
- Western U. Teleg. Co. v. Hoffman, 80 Tex. 420, 15 S. W. 1048, § 287.
- Western U. Teleg. Co. v. Kelly (Tex. Civ. App.) 29 S. W. 408, § 193.
- Western U. Teleg. Co. v. Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564, §§ 398, 399.
- Western U. Teleg. Co. v. Kinsley, 8 Tex. Civ. App. 527, 28 S. W. 831, § 287.
- Western U. Teleg. Co. v. Proctor, 6 Tex. Civ. App. 300, 25 S. W. 811, § 19.
- Wheat v. Owens, 15 Tex. 242, § 177.
- Wheatley v. Griffin, 60 Tex. 209, §§ 252, 259.
- Wheeler v. Burks (Tex. Civ. App.) 31 S. W. 434, § 75.
- Wheeler v. Selvidge, 30 Tex. 407, § 384.
- Wheelock v. Cavitt, 91 Tex. 679, 45 S. W. 796, § 107.
- Whetstone v. Coffey, 48 Tex. 269, §§ 117, 352.
- White v. Dabney (Tex. Civ. App.) 46 S. W. 653, § 129.
- White v. Latimer, 12 Tex. 61, § 313.
- White v. Lynch, 26 Tex. 195, §§ 189, 221.
- White v. Shepperd, 16 Tex. 163, §§ 117, 259.
- White v. Small, 22 Tex. Civ. App. 318, 54 S. W. 915, § 373.
- White v. Waco Bldg. Asso. (Tex. Civ. App.) 31 S. W. 58, § 399.
- White v. Wadlington, 78 Tex. 159, 14 S. W. 296, § 247.
- White v. White, 11 Tex. Civ. App. 113, 32 S. W. 48, § 227.
- Whiteselle v. Jones (Tex. Civ. App.) 39 S. W. 405, §§ 269, 273.
- Whittenberg v. Lloyd, 49 Tex. 633, § 268.
- Wichita Land & Cattle Co. v. Ward, 1 Tex. Civ. App. 307, 21 S. W. 128, § 313.
- Wilder v. McConnell, 91 Tex. 600, 45 S. W. 145, § 250.
- Wiley v. Prince, 21 Tex. 637, § 113.
- Wiley v. Wiley, 33 Tex. 358, § 357.
- Wilkinson v. Rowland, 3 Tex. App. Civ. Cas. (Willson) § 11, §§ 118, 123.
- Wilkinson v. Wilkinson, 20 Tex. 237, § 198.
- Williams v. Cleveland, 18 Tex. Civ. App. 133, 44 S. W. 689, § 270.
- Williams v. Ellingsworth, 75 Tex. 480, 12 S. W. 746, §§ 108, 128, 131.
- Williams v. Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595, § 397.
- Williams v. Galveston (Tex. Civ. App.) 58 S. W. 551, §§ 134, 252.

U.

Ullmann v. Jasper, 70 Tex. 446, 7 S. W. 763, §§ 69, 228.

Urquhart v. Womack, 53 Tex. 616, §§ 280, 322.

V.

Van Bibber v. Mathis, 52 Tex. 406, § 93.

Van Ratchiff v. Call, 72 Tex. 491, 10 S. W. 578, § 247.

Veramendi v. Hutchins, 48 Tex. 531, §§ 180, 392, 393.

Votaw v. Pettigrew, 15 Tex. Civ. App. 87, 38 S. W. 215, § 199.

W.

Wadkins v. Watson, 86 Tex. 194, 22 L. R. A. 779, 24 S. W. 385, §§ 68, 125, 128.

Waggner v. Haskell, 89 Tex. 435, 35 S. W. 1, §§ 249, 250, 253.

Walker v. Abercrombie, 61 Tex. 69, §§ 398, 399.

Walker v. House (Tex. Civ. App.) 24 S. W. 82, §§ 124, 263.

Walker v. Howard, 34 Tex. 478, § 392.

Walker v. Stringfellow, 30 Tex. 570, § 105.

Wall v. Clark, 19 Tex. 321, § 390.

Wallace v. Campbell, 54 Tex. 87, § 233.

Wallace v. Finberg, 46 Tex. 35, §§ 141, 143, 284.

Walling v. Hannig, 73 Tex. 580, 11 S. W. 547, §§ 50, 56, 204.

Waltee v. Weaver, 57 Tex. 569, § 112.

Walters v. Jewett, 28 Tex. 192, § 116.

Walters v. Texas Bldg. & L. Asso. (Tex. Civ. App.) 29 S. W. 51, §§ 263, 264.

Ward v. West (Tenn. Ch. App.) 35 S. W. 563, § 293.

Wardlow v. Miller, 69 Tex. 395, 6 S. W. 292, §§ 64, 136.

Warfield, Ex parte (Tex. Crim. App.) 50 S. W. 933, § 291.

Warhmund v. Merritt, 60 Tex. 24, § 265.

Warren v. Dickerson, 3 Tex. 460, §§ 130, 213.

Warren v. Jones, 69 Tex. 462, 6 S. W. 775, §§ 120, 122.

Warren v. Smith, 44 Tex. 245, § 37.

Wartelsky v. McGee, 10 Tex. Civ. App. 220, 30 S. W. 69, §§ 196, 289.

Washington v. State, 17 Tex. App. 197, § 305.

Washington L. Ins. Co. v. Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123, §§ 75, 227, 312.

Watkins v. Davis, 61 Tex. 414, § 247.

Watkins v. Hall, 57 Tex. 1, §§ 108, 381, 392.

Watkins v. Sproull, 8 Tex. Civ. App. 427, 28 S. W. 356, § 259.

Watson v. Rainey, 69 Tex. 319, 6 S. W. 840, § 380.

Watts v. Miller, 76 Tex. 13, 13 S. W. 16, §§ 262, 372, 381, 392.

Webb v. Burney, 70 Tex. 322, 7 S. W. 841, §§ 113, 114, 149.

Webster v. Willis, 56 Tex. 468, § 399.

- Weir v. Smith, 62 Tex. 1, § 160.
- Weir Plow Co. v. Carroll, 4 Tex. App. Civ. Cas. (Willson) § 178, 15 S. W. 123, § 90.
- Welborne v. Downing, 73 Tex. 527, 11 S. W. 501, § 270.
- Welder v. Lambert, 91 Tex. 510, 44 S. W. 281, §§ 184, 205, 206, 215.
- Wellborn v. Odd Fellows' Bldg. & Exch. Co. 56 Tex. 501, § 92.
- Wells v. Cockrum, 13 Tex. 127, §§ 62, 310.
- Wells v. Petree, 39 Tex. 420, § 162.
- Wenar v. Stenzel, 48 Tex. 484, §§ 363, 392.
- West v. West, 9 Tex. Civ. App. 475, 29 S. W. 242, §§ 365, 372, 373.
- Westbrooks v. Jeffers, 33 Tex. 90, § 312.
- West End Town Co. v. Grigg (Tex. Civ. App.) 54 S. W. 904, § 264.
- Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 1 L. R. A. 728, 9 S. W. 598, § 287.
- Western U. Teleg. Co. v. Hearne (Tex. Civ. App.) 40 S. W. 50, § 120.
- Western U. Teleg. Co. v. Hoffman, 80 Tex. 420, 15 S. W. 1048, § 287.
- Western U. Teleg. Co. v. Kelly (Tex. Civ. App.) 29 S. W. 408, § 193.
- Western U. Teleg. Co. v. Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564, §§ 398, 399.
- Western U. Teleg. Co. v. Kinsley, 8 Tex. Civ. App. 527, 28 S. W. 831, § 287.
- Western U. Teleg. Co. v. Proctor, 6 Tex. Civ. App. 300, 25 S. W. 811, § 19.
- Wheat v. Owens, 15 Tex. 242, § 177.
- Wheatley v. Griffin, 60 Tex. 209, §§ 252, 259.
- Wheeler v. Burks (Tex. Civ. App.) 31 S. W. 434, § 75.
- Wheeler v. Selvidge, 30 Tex. 407, § 384.
- Wheelock v. Cavitt, 91 Tex. 679, 45 S. W. 796, § 107.
- Whetstone v. Coffey, 48 Tex. 269, §§ 117, 352.
- White v. Dabney (Tex. Civ. App.) 46 S. W. 653, § 129.
- White v. Latimer, 12 Tex. 61, § 313.
- White v. Lynch, 26 Tex. 195, §§ 189, 221.
- White v. Shepperd, 16 Tex. 163, §§ 117, 259.
- White v. Small, 22 Tex. Civ. App. 318, 54 S. W. 915, § 373.
- White v. Waco Bldg. Asso. (Tex. Civ. App.) 31 S. W. 58, § 399.
- White v. Wadlington, 78 Tex. 159, 14 S. W. 296, § 247.
- White v. White, 11 Tex. Civ. App. 113, 32 S. W. 48, § 227.
- Whiteselle v. Jones (Tex. Civ. App.) 39 S. W. 405, §§ 269, 273.
- Whittenberg v. Lloyd, 49 Tex. 633, § 268.
- Wichita Land & Cattle Co. v. Ward, 1 Tex. Civ. App. 307, 21 S. W. 128, § 313.
- Wilder v. McConnell, 91 Tex. 600, 45 S. W. 145, § 250.
- Wiley v. Prince, 21 Tex. 637, § 113.
- Wiley v. Wiley, 33 Tex. 358, § 357.
- Wilkinson v. Rowland, 3 Tex. App. Civ. Cas. (Willson) § 11, §§ 118, 123.
- Wilkinson v. Wilkinson, 20 Tex. 237, § 198.
- Williams v. Cleveland, 18 Tex. Civ. App. 133, 44 S. W. 689, § 270.
- Williams v. Ellingsworth, 75 Tex. 480, 12 S. W. 746, §§ 108, 128, 131.
- Williams v. Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595, § 397.
- Williams v. Galveston (Tex. Civ. App.) 58 S. W. 551, §§ 134, 252.

- Williams v. Hall, 33 Tex. 212, § 372.
Williams v. Howard, 10 Tex. Civ. App. 527, 31 S. W. 835, § 380.
Williams v. Pouns, 48 Tex. 141, § 113.
Williams v. Stats, 40 Tex. Crim. Rep. 565, 51 S. W. 224, § 305.
Williams v. Williams, 67 Tex. 198, 2 S. W. 823 (note 2 S. W.) §§ 334, 341, 344.
Williams v. Willis, 84 Tex. 398, 19 S. W. 683, §§ 250, 253.
Williamson v. Conner, 92 Tex. 582, 50 S. W. 697, § 139.
Willis v. Mike, 76 Tex. 82, 13 S. W. 58, § 266.
Willis v. Morris, 66 Tex. 628, 1 S. W. 799, § 254.
Willis v. Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715, §§ 117, 253, 270.
Wilson v. Fields (Tex. Civ. App.) 50 S. W. 1024, §§ 374, 378, 385.
Wilson v. Helms, 59 Tex. 680, §§ 392, 395.
Wilson v. Johnson (Tex.) 60 S. W. 242, § 139.
Wilson v. Simpson, 68 Tex. 306, 4 S. W. 839, § 107.
Wilson v. Simpson, 80 Tex. 279, 16 S. W. 40, § 108.
Wilson v. Wilson, 36 Cal. 447, § 311.
Wimberly v. Pabst, 55 Tex. 587, § 198.
Wingate v. People's Bldg. & Loan Sav. Asso. 15 Tex. Civ. App. 416, 39 S. W. 999, § 265.
Winn v. Winn (Tex. Civ. App.) 57 S. W. 80, §§ 49, 122, 372.
Winter v. Texas Land & Loan Co. (Tex. Civ. App.) 54 S. W. 802, §§ 37, 280, 322.
Withee v. Withee, 50 Tex. 327, § 358.
Withrow v. Adams, 4 Tex. Civ. App. 438, 23 S. W. 437, §§ 378, 385, 392, 400.
Witt v. Harlan, 66 Tex. 660, 2 S. W. 41, § 109.
Woeltz v. Woeltz (Tex. Civ. App.) 57 S. W. 905, §§ 66, 253, 262, 353.
Wofford v. Unger, 55 Tex. 480, §§ 75, 312.
Wolf v. Butler, 8 Tex. Civ. App. 468, 28 S. W. 51, § 248.
Womack v. Shelton, 31 Tex. 592, § 385.
Womack v. Stokes, 12 Tex. Civ. App. 648, 35 S. W. 82, § 268.
Womack v. Womack, 8 Tex. 397, § 317.
Wood v. Wheeler, 7 Tex. 13, § 1.
Woodall v. Rudd, 41 Tex. 375, §§ 372, 373.
Woodley v. Adams, 55 Tex. 520, § 399.
Woodson v. Massenberg, 3 Tex. Civ. App. 146, 22 S. W. 106, § 296.
Woodward v. McNeill, 75 Tex. 146, 13 S. W. 222, §§ 42, 72, 152.
Woolley v. Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629, §§ 372, 374.
Workman's Mut. Aid Asso. v. Monroe (Tex. Civ. App.) 53 S. W. 1029, § 111.
Wortham v. Thompson, 81 Tex. 348, 16 S. W. 1059, § 128.
Worst v. Sgitcovich (Tex. Civ. App.) 46 S. W. 72, § 387.
Wren v. Peel, 64 Tex. 374, § 395.
Wright v. Barnett (Tex. Civ. App.) 48 S. W. 1096, § 115.
Wright v. Blackwood, 57 Tex. 644, § 105.
Wright v. Doherty, 50 Tex. 34, §§ 128, 365.

Wright v. Hays, 10 Tex. 130, §§ 22, 67, 105, 116, 287.
Wright v. Hays, 34 Tex. 253, § 394.
Wright v. McGinty, 37 Tex. 733, § 198.
Wright v. Thompson, 14 Tex. 558, § 122.
Wright v. Tipton, 92 Tex. 168, 46 S. W. 629, § 289.
Wright v. Wright, 3 Tex. 168, §§ 283, 340, 341, 343.
Wright v. Wright, 6 Tex. 3, §§ 12, 334, 341, 347, 357.
Wyche v. Clapp, 43 Tex. 543, § 161.
Wynne v. Hudson, 66 Tex. 1, 9, 17 S. W. 110, §§ 249, 270.

X.

Ximines v. Smith, 39 Tex. 49, §§ 49, 278.

Y.

Yancy v. Batte, 48 Tex. 46, § 149.
Yates v. Houston, 3 Tex. 433, §§ 13, 168, 198.
Yoe v. Montgomery, 68 Tex. 338, 4 S. W. 622, § 239.
Young v. Van Benthuyssen, 30 Tex. 762, §§ 107, 116, 120.
Young v. Willis, 63 Tex. 388, § 226.
Young v. Young (Tex. Civ. App.) 23 S. W. 83, § 356.

Z.

Zapp v. Strohmeyer, 75 Tex. 638, 13 S. W. 9, § 355.
Zeliff v. Jennings, 61 Tex. 458, § 153.
Zimpelman v. Robb, 53 Tex. 274, § 105.
Zorn v. Tarver, 57 Tex. 388, § 216.
Zwernemann v. Von Rosenberg, 76 Tex. 522, 13 S. W. 485, §§ 373, 374.

THE LAW OF MARRIED WOMEN IN TEXAS.

PART I.

CHAPTER I.

MARRIAGE.

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| § 1. Of Marriage in General. | § 11. Indian Customs and Forms. |
| § 2. Nature of the Contract Super-inducing this Relation. | § 12. Proof of Marriage. |
| § 3. Who May Enter into. | § 13. Presumptions. |
| § 4. Who May Not. | § 14. Void and Voidable. |
| § 5. Slaves. | § 15. Fraud and Duress. |
| § 6. Contractual Age in Women. | § 16. Invalid Marriages; Rights of Innocent Wife. |
| § 7. Consent of Parents. | § 17. Wife Takes Surname of Husband. |
| § 8. Solemnization. | § 18. Infant Female Becomes of Full Age by Marriage. |
| § 9. Who Authorized to Celebrate Rites. | § 19. Common-Law Marriages. |
| § 10. License. | |

§ 1. Of Marriage in General.

In order to a proper understanding of the law governing the rights, liabilities, and disabilities of married women, it will be necessary to notice in a cursory manner a few of the principles of law applicable to marriage, or, more accurately speaking, to that status of one man and one woman growing out of an executed agreement to marry.

The source of marriage is the law of nature. It had its origin
M. W.—1.

in the breast of Divinity. When God said it was not good that the man should be alone, and gave to Adam an helpmeet, it was the establishment of a precedent the wisdom of which no court has ever questioned, and of such eminent authority that it will probably be followed and approved as long as civilization lasts.

Marriage is sometimes spoken of as a civil contract. It is more. It is an institution established by God himself, is recognized by all Christian and civilized nations, and is essential to the peace, happiness, and well being of society. It is the substratum upon which rests our social structure, and out of which grow our domestic relations. Marriage is not a mere contract, but a relation, or status, proceeding from a civil contract between one man and one woman of the needful civil and physical capacity. It is described by Mr. Bishop as the "civil status of one man and one woman united in law for life, under the obligations to discharge to each other and the community those duties legally incumbent on those whose association is founded on the distinction in sex."¹ In common parlance, marriage is regarded as the act of celebrating the nuptials, or consummating the agreement to marry, and this is more nearly accurate from a legal standpoint than the loose expressions met with which regard it in the light of a civil contract, and nothing more.

Radically different from the common law, we regard marriage as a state of coequality between husband and wife, when property rights are involved. They are not one under our law, but the wife's separate existence and identity are recognized, and are not merged in that of her husband.²

§ 2. Nature of the Contract Superinducing this Relation.

Since there can be no marriage relation between two persons without an agreement to enter into such relation, every marriage is preceded by a contract, and this contract superinduces the status above referred to. The laws governing this class of contracts are not essentially different from those governing other civil contracts. There must of necessity be mutual consent, mu-

¹Bishop, Mar. & Div. 3.

burn v. Walker, 11 Tex. 329; Magee

²Wood v. Wheeler, 7 Tex. 13; Mil- v. White, 23 Tex. 180.

tual wills, and capacity to contract,³ as well as an actual contracting, to render the act binding upon the parties. By capacity to contract is not meant the capacity to contract generally, but there may exist a capacity to contract and enter the marriage relation when the person so contracting may not have the capacity to make general contracts. The law provides definite modes for placing its sanction upon these contracts, for their proper attestation and authentication. This is proper, as society should in a measure be thus protected. Yet marriage is in no sense the result of legislation, but proceeds, as we have seen, from the contract of the parties.

This contract is entered into in the same way as other civil contracts. It is the mutual agreement of a man and a woman to marry each other, or to become husband and wife in the future, and must satisfy the legal requirements as to parties, consideration, etc., as other contracts must. There must be an offer of marriage, or a promise to marry, by the one, and made known to the other. It may be implied from acts or conduct if it appear that both parties understood it to be an offer of marriage. There must be an acceptance of the offer, or a promise to marry, in return. It need not be in writing, as it is not a "contract in consideration of marriage," within the statute of frauds. Should either party refuse to carry out the agreement, the other may bring an action for damages. The contract may be brought to an end in all the ways usual to contracts; that is, by mutual rescission, breach by one of the parties, death of one or both, and by executing it, or mutual performance.

§ 3. Who May Enter into.

Every person who is capable of contracting, and who is not forbidden by statute, may enter into the marriage relation. The contract must be made by competent parties. Everyone, in order to bind himself, must not only be capable of making a binding contract, but of entering into a valid marriage. So that a person fully able to make an ordinary civil contract may not, because of sexual impotency, be a competent person to make a

³Rice v. Rice, 31 Tex. 174.

marriage contract. He is not a competent party for such a contract. But, again, there are persons not capable of making general contracts, who are nevertheless fully competent to make a marriage contract in a qualified sense, and to perfectly consummate the marriage relation. Instance: an infant female may agree to marry, though her agreement is not binding upon her; yet if she choose to abide her agreement, she may contract a perfectly valid marriage, if she meet the requisite requirements in other respects, and be not of such tender years that she is forbidden to marry by positive law. Again, her contract, if with one fully competent to contract, is enforceable by her though not by the other. That is, she may sue for its breach whilst the other may not. There can be no lawful wedlock between parties who for any reason, such as bondage,⁴ or duress, cannot exercise the freedom of consent essential to every contract. Of course, one is not bound by his contract, or, rather, his promise, to do that which he cannot lawfully do. Example: a promise to marry by one already married; or a promise to marry one where such intermarriage is inhibited by statute.

§ 4. Who May Not.

In this state males under sixteen and females under fourteen years of age are forbidden to marry,⁵ as are also persons of European blood or their descendants to intermarry with Africans or the descendants of Africans,⁶ and such a marriage would, in either instance, be void, and the latter, where the intermarriage is within certain defined degrees, punished as a criminal act.⁷ There are also appropriate penal statutes directed against bigamy⁸ and incestuous marriages,⁹ the prohibited degrees being: No man shall marry his mother, his father's sister or half-sister; his mother's sister or half-sister; his daughter; the daughter of his father, mother, brother, or sister, or of his half-brother or sister; the daughter of his son or daughter; his father's widow; his wife's daughter; or the daughter of his wife's son or daughter; and no woman shall marry her father;

⁴Timmins v. Lacy. 30 Tex. 115.

⁵Rev. Stat. 1895, art. 2955.

⁶Ibid. art. 2959.

⁷P. C. arts. 346, 347.

⁸Ibid. art. 344.

⁹Ibid. art. 349.

her father's brother or half-brother; her mother's brother or half-brother; her own brother or half-brother; her son; the son of her brother or sister, or of her half-brother or half-sister; the son of her son or daughter; her mother's husband after the death of her mother; her daughter's husband after the death of her daughter; her husband's son; the son of her husband's son or daughter;¹⁰ and a marriage attempted within any of these prohibited degrees would of course be void.

There was no law prohibiting marriages between whites and blacks from 1828 until the declaration of independence; Texas during this period being a province of Mexico, in which country such marriages are said to be common to the people of every degree of social standing.¹¹

It becomes a penal offense only when a marriage between a white person and a negro takes place and the latter is of African descent to and inclusive of the third generation. Yet all intermarriage between the descendants of the two races are declared void by the civil statute.

§ 5. Slaves.

Since there can be no valid marriage between persons who are incapable of assenting to any contract, it follows that slaves could not marry, even with the consent of their master, so as to constitute them husband and wife. Their disabilities were such that they could make no contract; they could not take property by purchase or descent; they were not entitled to the rights and considerations of matrimony; they had no heirs and could make no wills; had no relief in cases of adultery; and were not protected from being witnesses against each other. They were mere chattels. Contubernism was their matrimony; a permitted cohabitation not partaking of the nature of lawful marriage, which they could not contract.¹² That some rights did grow out of this quasi marriage relation there can be no doubt; but this for another and different reason than the attempted contract of the slaves. Slaves had no civil rights; these were conferred on them by emancipation. But from that time forward their

¹⁰Ibid. arts. 350, 351.

¹²Timmins v. Lacy, 30 Tex. 115.

¹¹Honey v. Clark, 37 Tex. 686

rights are to be determined as those of other persons not similarly incapacitated. So that where there had been a slave marriage by consent of the master and with the moral assent of the slaves, from the moment of emancipation if each party continued to recognize the relation the same legal results would flow from such marriage as from a marriage between free persons.¹³ The state of slavery in this country resembled that known to the Roman law, and it is thought that the rights of the slave in respect to marriage and the acquisition of property by way of inheritance are the same as under that law.

The Constitution of 1869¹⁴ validates the marriage of all persons who had previously lived together as man and wife, and both of whom by the law of bondage were precluded from the rites of matrimony, and who continued to so live together until the death of one of the parties, or until the adoption of the Constitution, and makes legitimate the issue of their cohabitation.¹⁵ And by act of legislature of August 15, 1870, such marriages were validated and offspring legitimated where such slaves had continued to so live together to that time.¹⁶ But it is not thought that these provisions had the effect, nor was it their purpose, to invalidate slave marriages, which, by reason of cohabitation and mutual recognition of each other as husband and wife after emancipation, were valid marriages, for these things would constitute a good marriage independent of curative acts, of constitutions or statutes, not being expressly forbidden;¹⁷ but its object was to remove all doubt as to the validity of the class of marriages named, and not to invalidate any.¹⁸

§ 6. Contractual Age in Women.

In the absence of any statute upon the question, the common law would no doubt govern in the matter of the age at which a

¹³Timmins v. Lacy, 30 Tex. 115; Livingston v. Williams, 75 Tex. 653, 13 S. W. 173; Cumby v. Henderson, 6 Tex. Civ. App. 519, 25 S. W. 573.

¹⁴Art. 12, § 27.

¹⁵Clements v. Crawford, 42 Tex. 601; Hill v. Fairfax, 38 Tex. 220;

Steward v. State, 7 Tex. App. 326.

¹⁶Rev. Stat. 1895, art. 2962.

¹⁷Coleman v. Vollmer (Tex. Civ. App.) 31 S. W. 413.

¹⁸Cumby v. Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673.

marriage would be treated as valid. Nonage is an impediment to marriage only as it is attended with those things which incapacitate the party for a perfect marriage union. So that boys and girls whose physical natures are not sufficiently mature cannot contract a valid marriage relation, not because of their nonage, but because of their physical inability to become husband or wife.

By the common law, fourteen in males and twelve in females is considered as the age of matrimonial consent; it being thought that the person has at that time arrived at an age sufficient to have natural and corporal ability to perform the duty of marriage; in short, to have arrived at the state of puberty, as physiologists define it. This was simply an arbitrary rule. That state may be reached at an earlier date, but if the party be under seven years it was conclusively presumed otherwise, and the marriage held void. Between those ages it was considered an inchoate and imperfect marriage, which might be avoided by either party upon arrival by either at the age of consent mentioned. The principle is that both are bound or neither, and that if one has a right to disaffirm, both have.

The Spanish law required that persons, to be able to contract a betrothing, must have reached the full age of seven years,¹⁹ and placed the ages below which parties were forbidden to marry at the common-law ages of fourteen and twelve,²⁰ and required the consent of the father where the male was under twenty-five years and the female under twenty-three.²¹

By an early statute of this state the age of consent was placed at the common-law ages of fourteen and twelve,²² which continued to be the law until the act of November 1, 1866, which is our present statute, and which places the ages under which persons are forbidden to marry at sixteen in males and fourteen in females.²³

§ 7. Consent of Parents.

At common law, consent of the parents was not necessary to

¹⁹Schmidt's Civil Law, art. 7.

²⁰Ibid. art. 29.

²¹Ibid. art. 8.

²²Paschal's Dig. art. 4665.

²³Rev. Stat. 1895, art. 2955.

the validity of the marriage. It was, under the Spanish law, proper. The provision of our statute which declares that "no clerk shall issue a license without the consent of the parents or guardians of the parties applying, unless the parties so applying shall be, in the case of the male, twenty-one years of age, and in the female, eighteen years of age,"²⁴ is intended to operate only as an obstruction to the celebration of such marriages, but with their validity it has nothing to do. It is, in the language of the ecclesiastical law, an *impedimentum impeditivum*, obstructing the way to the celebration, but not an *impedimentum dirimens*, affecting the validity of the marriage once solemnized.²⁵ The reason for this rule is obvious. Marriage being a thing of right, and the minor being by nature capacitated to enter into its relation, and laboring under none of the inhibitions of positive law, the law ought not to say he shall not marry, but, questioning his discretion, if not his right, it lends the aid of its provision to the parent until the minor has reached that riper and maturer age at which time the law completely removes its hands. Consent is in no instance required after the age of twenty-one in males and eighteen in females.²⁶

§ 8. Solemnization.

No formal celebration of marriage is necessary by the law of nature, or by the canon law prior to the Council of Trent, or by the civil law. In England it is held that such celebration is necessary, but a different rule has obtained in most of the states of the Union.²⁷ As has been seen, Texas was, prior to the Revolution, a province of Mexico, and governed by her laws, and it has been repeatedly held that during this period, in obedience to those laws, the ceremonies of the Roman Catholic religion had to be complied with to render the marriage valid, and if those rites were not observed the union was meretricious and without any legal sanction.²⁸ Our Republic hastened early to pass curative statutes upon this question in view of the common

²⁴Ibid. art. 2957.

²⁷14 Am. & Eng. Enc. Law, p. 514.

²⁸Horner v. Liddiard, 1 Hagg. Consist. Rep. 337.

²⁸Smith v. Smith, 1 Tex. 621; Rice v. Rice, 31 Tex. 174.

²⁶Rev. Stat. 1895, art. 2957.

custom among her people of marrying without observing these rites, and by ordinance of January 16, 1836, and the acts of June 5, 1837, and February 5, 1841, made legal all marriages theretofore celebrated by bond or otherwise, not in conformity with the law as "it was aforesaid."²⁹ These acts were intended to legalize all previous marriages which had been irregularly celebrated, as also all other marriages where the parties were then living together in married relation, and made legitimate all children born of such marriages, whether before or after the passage of these acts.³⁰

Our courts have looked with much favor upon the beneficent effects of these statutes, and at every opportunity have given them the most liberal construction, notwithstanding the rigor of the Mexican rule, upon the very high ground of public policy, and have uniformly upheld, as valid, marriages contracted during the time of our dependency upon that country, whenever the consent of the parties and the intention to enter into the state of matrimony, and to assume its duties and obligations, is clearly shown.³¹

§ 9. Who Authorized to Celebrate Rites.

All regularly licensed or ordained ministers of the gospel, Jewish rabbis, judges of the district and county courts, and all justices of the peace of the several counties are authorized to celebrate the rites of matrimony between all persons legally authorized to marry.³² But a marriage would not, for that reason, be invalid when celebrated by one of the above functionaries if he were only such *de facto*.³³ And in the case of state and county officials, their act in celebrating such rites beyond the limits of their civil jurisdiction will not render the marriage invalid.³⁴

§ 10. License.

Any person desirous of marrying shall apply to the clerk of

²⁹Paschal's Dig. arts. 4662, 4664, 4671, 4672; Rev. Stat. art. 2060.

³⁰Rice v. Rice, 31 Tex. 174.

³¹Sapp v. Newsom, 27 Tex. 537; Lewis v. Ames, 44 Tex. 319.

³²Rev. Stat. art. 2954.

³³Holder v. State, 35 Tex. Crim. Rep. 19, 29 S. W. 793.

³⁴Simon v. State, 31 Tex. Crim. Rep. 186, 20 S. W. 399, 716.

the county court, and shall receive from him a license directed to all persons authorized by law to celebrate the rites of matrimony, which shall be sufficient authority for any one of such persons to celebrate such marriage.³⁵ Whilst the statute directs the issuance of a license, still, a marriage consummated without such license would not, for that reason alone, be invalid.³⁶ And a marriage celebrated in any other county than the one in which the license was issued is valid and binding;³⁷ that, too, notwithstanding the fact that such celebration is by a magistrate of the county where such license was issued rather than of the county where celebrated.³⁸

But, should any person authorized by law to celebrate the rites of matrimony perform the marriage ceremony without a license first having been issued as required by law, he would be guilty of a misdemeanor.³⁹

§ 11. Indian Customs and Forms.

In an action where the issue was whether plaintiff's father and mother were married at the time of her birth, it appeared that her mother was an Indian, residing with the Creek Nation in the Indian territory; that the parents, without having any ceremony performed, agreed to become husband and wife; that they cohabited for a considerable time before and after plaintiff was born, and publicly treated each other as husband and wife; that, according to the customs and usages of the Creeks, these facts constituted a valid marriage. Our court considered the marriage valid, and plaintiff legitimate.⁴⁰ And if such marriage be between the Indians themselves, who are wards of the government, and not, in matters of marriage and the like, subject to state laws, it need not be celebrated within the borders of their reservation to be valid.⁴¹ This is in keeping with the rule with

³⁵Rev. Stat. art. 2956.

³⁶Cumby v. Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673; Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56, S. C. 87 Tex. 647, 30 S. W. 869; Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564; Galveston, H. & S. A. R. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. 135.

³⁷Cummings v. State, 36 Tex. Crim. Rep. 256, 36 S. W. 442.

³⁸Simon v. State, 31 Tex. Crim. Rep. 186, 20 S. W. 399, 716.

³⁹P. C. art. 345.

⁴⁰First Nat. Bank v. Sharpe, 12 Tex. Civ. App. 223, 33 S. W. 676.

⁴¹La Riviere v. La Riviere, 97 Mo. 80, 10 S. W. 840.

us, for any mutual agreement between competent parties to marry, followed by a living together and recognition of each other as husband and wife, will constitute a valid marriage, no matter where contracted. If not at the place of contract, it will be such from the moment the parties submit themselves to our jurisdiction, and continue such relation.

§ 12. Proof of Marriage.

Marriage is proved as other issues,—either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances from which its existence may be inferred. Greater particularity is required upon the trial of indictments and of matters in their nature criminal, as in such cases proof by general reputation alone is not sufficient.⁴² In divorce proceedings a valid marriage may be proved by such evidence as would be necessary to establish any other fact;⁴³ and in all cases other than criminal, any kind of evidence which, under the ordinary rules, would be admissible, if satisfactory, is sufficient. The affirmative decree of a court having jurisdiction of the question of marriage or no marriage is conclusive evidence of the marriage.⁴⁴

It may also, of course, be proved by the testimony of witnesses who were present and witnessed the marriage ceremony;⁴⁵ by the testimony of the parties themselves or their admissions; by the production of the marriage license with the officer's return of "executed;" by the conduct of the parties,⁴⁶ such as addressing each other as man and wife, by words or letters, attending church or other public places as man and wife, acknowledging their children as legitimate, joining each other in the conveyance of real estate, etc.; all these are circumstances tending, either mediately or immediately, to establish the fact of marriage. But like all other circumstances, such evidence may be explained, rebutted, or contradicted. Marriage may also, in a proper case,

⁴²P. C. art. 348.

⁴⁵Galveston, H. & S. A. R. Co. v.

⁴⁶Wright v. Wright, 6 Tex. 3;
Stafford v. Stafford, 41 Tex. 111.

Cody, 20 Tex. Civ. App. 520, 50 S.
W. 135.

⁴²Green. Ev. 461.

⁴⁶Dumas v. State, 14 Tex. App.
464.

be proved by the declaration of a relative,—where such declarant is dead, and where the declaration was made before the controversy arose, and even though the declaration be contained in a clause of the declarant's will.⁴⁷ In *Tarpley v. Poage*, 2 Tex. 139, it is held that marriage can be proved by evidence of cohabitation, reputation, acknowledgment of parties, reception into the family, etc.; but in the case of *McGowen v. Bush*, 17 Tex. 195, wherein it was claimed by the plaintiff that the note sued upon was given in compromise of a cause of action which his assignor, the payee in the note, had against the defendant, for alleged illicit intercourse with the wife of the payee, the court held that, under those circumstances the marriage could not be proved by evidence of cohabitation, the admission of the parties, nor by general reputation; but that an actual marriage must be proved. But if by that it was meant to say that the husband would have no cause of action against another on account of criminal conversation with his wife, unless they were regularly married in accordance with the statutory requirements, such is not thought to be in keeping with the better rule as now held by our courts. For, no doubt, evidence sufficient to establish a marriage good only as a common-law marriage would, in such case, be sufficient. It is analogous to an action by the husband or wife for the death of the other, in which case a common-law marriage will authorize the action.⁴⁸

Even in criminal cases, where by statute proof of marriage by mere reputation is not considered sufficient, still it is admissible, and, taken in connection with other proper evidence, such as proof of cohabitation, admissions, etc., will sustain a conviction.⁴⁹ Where the date of a particular marriage may become material as affecting a man's right to mortgage his homestead, to determine his status at a particular time, the return of the marriage license is admissible for the purpose of establishing such date.⁵⁰ But where the materiality arises in the prosecution of an offense, and such date is sought to be shown as an inde-

⁴⁷*Summerhill v. Darrow* (Tex.) 57 S. W. 942.

⁴⁸*Dumas v. State*, 14 Tex. App. 464.

⁴⁹*Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135.

⁵⁰*Stoker v. Patton* (Tex. Civ. App.) 35 S. W. 64.

pendent fact, the license and certificate are not admissible for such purpose. The best evidence is that of persons who witnessed the ceremony. The minister's certificate is but hearsay.⁵¹

§ 13. Presumptions.

Every reasonable presumption will be indulged in favor of the validity of a marriage when that question is inquired into. Where the intention of the parties is clear, and their acts and conduct indicate an intention upon their part to enter into the marriage relation, the courts will not inquire with a very scrutinizing eye into the formalities attending its solemnization, but will presume largely in favor of its validity. The absence of the first wife will raise the presumption of death, and a subsequent marriage by the husband will be held valid. Where the presumption of the continuance of life of the absent spouse would impute crime to one of the parties to a marriage, the presumption of innocence will outweigh, and the marriage be held valid.⁵² No precise time is given within which an absent spouse will be presumed not dead, where such presumption would fatally affect a marriage; and probably no such presumption would ever be indulged, no matter how short the absence. Death was presumed after four years, in *Yates v. Houston*, 3 Tex. 433. Not being heard from within five years is made conclusive evidence of death in a prosecution for bigamy.⁵³ This presumption increases with the lapse of time during which the parties live and cohabit together as man and wife; and the courts seize quickly, and turn to account, every act, word, circumstance, and even probability, which tends in the slightest to uphold that most sacred of all human institutions,—marriage. Any other course would be fraught with much mischief, would unsettle our domestic relations, and bastardize an innumerable number of innocent children. As an example of the extent to which our courts indulge this presumption, the case of *Nixon v. Wichita*

⁵¹*Chew v. State*, 23 Tex. App. 230, 5 S. W. 373.

⁵²*Lockhart v. White*, 18 Tex. 102; *Carroll v. Carroll*, 20 Tex. 732; *Nix-*

on v. Wichita Land & Cattle Co. 84 Tex. 408, 19 S. W. 560.

⁵³P. C. art. 345.

Land & Cattle Co. 84 Tex. 408, 19 S. W. 560, is quite fitting. Our present Chief Justice, speaking for the court, said: "But, even if it had been shown that the first wife was living at the time of the second marriage, we should be constrained to presume, under the facts of this case, that there was a divorce. . . . Neither the fact that one of the plaintiffs testified that she never heard that her father and mother were divorced, nor that another witness swore that the first wife believed her husband to be dead, at the time of her second marriage, ought to prevail against a presumption operating with such constraining force, and supported by such strong considerations of public policy."

This presumption is stronger than the presumption that officers have done their duty.⁵⁴ But the presumption will not be indulged where a marriage could not, under the law, be contracted between the parties, for the law will never presume anyone guilty of crime.⁵⁵

§ 14. Void and Voidable.

All marriages entered into in violation of express law are void; and none of the results usual to valid marriages can flow from such an union. We have already seen who are thus prohibited from marrying.⁵⁶ Mr. Bishop defines a void marriage to be one that is good for no legal purpose, and whose invalidity may be maintained in any court between any parties, whether in the lifetime or after the death of the supposed husband or wife, and whether the question arises directly or collaterally.⁵⁷ Accepting this to be a correct definition, to this class properly belong all marriages between persons who are inhibited by statute from marrying; while marriages thought to be void upon the ground of some existing impediment, such as impotence, non-age, idiocy, and the like, are only voidable. While the statute speaks of such marriages as being void, still it provides a juris-

⁵⁴*Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135.

⁵⁵*Oldham v. McIver*, 49 Tex. 556.

⁵⁶*Ante*, § 4, p. 4.

⁵⁷*Bish. Mar. & Div.* 105.

diction for decreeing their nullity, indicating that such marriages are voidable as that term is commonly understood.⁵⁸

§ 15. Fraud and Duress.

Like all other contracts, the marriage contract may be avoided for fraud and duress; even after the contract is consummated by a celebration, if there be no element of ratification. It is not profitable to enter minutely into a discussion of what species of fraud and force will have this effect. It has been held that false swearing upon the part of one in obtaining a marriage license, if repudiated by the innocent party as soon as the fraud is discovered, and before cohabitation, will authorize a decree of nullity.⁵⁹ It would probably make no difference that there had been cohabitation, if the fraud were not discovered until afterward. It cannot be clear that cohabitation, more than any other act constituting the marriage relation, should disentitle one to relief against fraud. So, a party laboring under duress could not make such a contract as the courts would not relieve him against. The duress need not be by the defendant, but may be by his friends or relatives.⁶⁰ To be sufficient ground for annulment, it must have been the proximate cause of the marriage. One cannot avoid a marriage consummated to avoid the consequences of a penal statute, upon the complaint that it was under duress.⁶¹

§ 16. Invalid Marriages; Rights of Innocent Wife.

A marriage may be held valid for one purpose, while invalid for another; thus, a marriage insufficient to form the basis of a prosecution for bigamy against the husband, might, as to the wife, produce civil effects, and this distinction must be borne in mind. For, when the wife's property rights are involved, it is not every irregularity that will render the marriage invalid, but,

⁵⁸Rev. Stat. art. 2976. See further on this subject, *Divorce*, *post*, chap. xxvii.

⁵⁹Robertson v. Cole, 12 Tex. 356.

⁶⁰Marks v. Crume, 16 Ky. L. Rep. 707, 20 S. W. 436.

⁶¹Medrano v. State, 32 Tex. Crim. Rep. 214, 22 S. W. 684. See *Divorce*, *post*, chap. xxvii.

as already seen, very slight circumstances will operate to have the marriage held valid as to the wife, and give to her her rights as a lawful wife, whether she be such or not. This is true when the wife contracts the marriage in good faith, but where there is an impediment to the marriage, such as a former living wife, which renders a second marriage unlawful. In such case, if the wife, in ignorance of such impediment, in good faith entered into the relation, it is as to her and her children born of such an union, what she honestly believed it to be,—a valid marriage⁶² in so far as those rights may not interfere with the superior rights of the real wife, who is equally innocent. Such was the rule of the Spanish law, and with us, even prior to the adoption of the common law.⁶³

§ 17. Wife Takes Surname of Husband.

Upon marriage the law confers upon the wife the name of her husband,⁶⁴ and this continues to be her lawful name, till changed by a subsequent marriage or by the decree of a competent court, as on final disposition of a divorce proceeding, where such change of name is specially prayed for⁶⁵—a relic of the common-law fiction of unity.

§ 18. Infant Female Becomes of Full Age by Marriage.

Under our statute females remain minors until the age of twenty-one years, provided they have never been married.⁶⁶ Upon marrying, “in accordance with the laws of the state,” one becomes, from and after such marriage, of full age, and entitled to the same privileges as though she had been of full age at the time of such marriage.⁶⁷ The article cannot be limited in its operation to those marriages celebrated under the forms prescribed by statute, but embraces equally those that are valid under the other rules of law as announced by our courts.

⁶²Smith v. Smith, 1 Tex. 621;
Morgan v. Morgan, 1 Tex. Civ. App.
315, 21 S. W. 154.

⁶³Lee v. Smith, 18 Tex. 141.

⁶⁴Freeman v. Hawkins, 77 Tex.
498, 14 S. W. 364.

⁶⁵Rev. Stat. art. 380

⁶⁶Ibid. art. 2552.

⁶⁷Ibid. art. 2974. See *post*, § 313,
p. —.

§ 19. Common-Law Marriages.

We have seen that our statutes relative to the formalities to be observed in the procuring and issuance of marriage licenses, and in the celebration of the marriage rites by certain named officers and persons, are, at most, only directory; and it cannot be doubted that a marriage contracted bona fide, and not in conformity with the statute in any one or all of the particulars mentioned, would be valid and binding in so far as the same would have been valid and binding had the requirements of the statute been studiously observed. In the absence of a statute declaring void all marriages not solemnized in accordance with its provisions, any marriage regularly made according to the common law, without observing the statutory regulations, would, therefore, be a valid marriage. This is the doctrine as laid down by Prof. Greenleaf, approved by Justice Strong for the Supreme Court of the United States, and followed by the civil branch of our appellate courts, and by the court of criminal appeals in an opinion by Judge Davidson in the following words: "Such statutes are merely directory. Marriage is a civil contract, and is a thing of common right, so recognized by all civilized countries in all ages, and is encouraged by public policy. A rule of construction as contended for by appellant would bastardize children, whose parents believed they were legally married, and who were not conscious of violating any law, human or divine, and who believed they had entered into the marital relation without coming in conflict with the provisions of statutory enactments. . . . Our statute does not render null, or prescribe penalties against, marriages not entered into under the terms thereof."⁶⁸

It is undoubtedly in perfect consonance with the spirit of our law, that marriages, deficient only in some technical statutory requirement as to manner of solemnization or the like, should be deemed good as common-law marriages, where it appears that it was the intention of the parties to enter into a valid marriage relation. Whatever may have formerly been thought of the

⁶⁸Holder v. State. 35 Tex. Crim.
Rep. 19, 29 S. W. 793.

question it is now well settled in favor of the validity of such marriages.⁶

And the results and effects of a common-law marriage are precisely the same as if one celebrated according to the requirements of the statute. Thus, one having a common-law husband or wife living cannot contract a second marriage;⁷ their children are legitimate, and each has the same rights, personal and in property, and otherwise, as where the celebration is statutory. But before such marriage will be sustained, it must be one, not only good according to the common-law rule, but must, in addition, be not in violation of any law of this state. For no marriage in violation of any law can be good as a common-law marriage. Thus, a girl under fourteen years of age cannot contract such a marriage.⁸

The case of *Freeman v. Faxon*, 10 Tex. Civ. App. 304, 25 S. W. 511, decided by our court of civil appeals, holds the contrary of the above doctrine. But the later cases cited some of which are of the supreme court, clearly support the text. And they announce the correct rule, for laws in derogation of the citizen's rights ought to be so construed as not to deprive one of any right unless the intention to do so be clear. Our statute does not declare marriages not celebrated as therein directed void. It does declare certain marriages void, thus impliedly recognizing the validity of all others. Thus, males after they pass sixteen, and females after they pass fourteen, years are not forbidden to marry.

But it is not every living together of a man and a woman that will constitute a common-law marriage. Such relation may be illicit, even though both be perfectly competent to contract a valid marriage, for the simple reason that they may not

⁶*Cumby v. Henderson*, 4 Tex. Civ. App. 519, 25 S. W. 673; *Holder v. State*, 35 Tex. Crim. Rep. 19, 29 S. W. 730; *Ingersoll v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. 56, S. C. 87 Tex. 667, 30 S. W. 469; *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 544, S. C. 58 Tex. 641, 32 S. W. 871; *Simmons v. Simmons*, 1 Tex.

Civ. App. 39 S. W. 639; *Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 30 S. W. 135; *Schwartz v. Allen*, 1 Tex. Civ. App. 37 S. W. 966.

⁷*Chapman v. Chapman*, 16 Tex. Civ. App. 382, 41 S. W. 533.

⁸*Hardy v. State*, 37 Tex. Crim. Rep. 35, 38 S. W. 615.

have intended to do so. The acts of the parties in living together—their cohabitation, their statements—do not of themselves constitute marriage; they are only so many circumstances evidencing a marriage. A relation illicit in its inception may become lawful,⁷² but, when lawful in the beginning, cannot, of course, become unlawful by reason of the *mala fides* of the parties subsequent to the marriage.

⁷²Cuneo v. De Cuneo (Tex. Civ. App.) 59 S. W. 284.

PART II.

PART II.

WIFE'S RIGHTS, POWERS, LIABILITIES, AND DISABILITIES.

CHAPTER II.

RIGHTS AND LIABILITIES IN GENERAL.

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|---|---|
| § 20. Husband and Wife, their Relation by Nature. | § 28. Wife's Domicil. |
| § 21. At Common Law. | § 29. Husband must Support the Wife. |
| § 22. Spanish Law of Marital Rights. | § 30. His Authority over Her Person. |
| § 23. Constitutional Provisions. | § 31. When He has Abandoned Her or is Insane. |
| § 24. Act of 1840 Adopting the Common Law. | § 32. Married Women as Agents, Trustees, etc. |
| § 25. Policy of Our Laws. | § 33. Suffrage; Holding Public Office. |
| § 26. Law Governing Prior to 1840. | § 34. Conflict of Laws Generally. |
| § 27. Rights of Persons Married Elsewhere. | |

§ 20. Husband and Wife, their Relation by Nature.

Through the pages of profane and Bible history we find that mankind has always existed in families. It is God's special and favorite plan for the promotion of the well being, peace, and comfort of man, and the protection and happiness of woman. Male and female created he them. And this distinction in sex bespeaks marriage, procreation, and the consequent family relations. In all God's laws there is order, and nowhere in nature is this more fully exemplified than in the family affairs of his creatures. Man physically strong, courageous, bold, capable of planning, providing, and protecting; woman delicate, affection-

ate, confiding, dependent; the one a born ruler, the other a helpmeet; the former the natural head of the family, whose right is to govern and whose duty is to provide; the latter a dependent, whose right is maintenance and protection, and whose duty is obedience and love. Nor does this view minify woman. The laws of all civilized nations governing the conjugal rights are grounded upon this basal theory, and are right or wrong, only as they approximate to, or recede from, the true spirit of this natural relation.

§ 21. At Common Law.

The rule of the common law with reference to the wife's rights and disabilities is familiar to every lawyer. Her entire legal existence was completely merged in that of her husband. They were in law one, and that one the husband. Her separate existence and identity as a distinct person was suspended during coverture, or incorporated in that of her husband under whose protection she performed everything. By her marriage all her rights to personal property vested in him absolutely, and a freehold estate in her realty continuing during their joint lives, and by possibility during his life should he survive. She was incapable of contracting or acting as a *feme sole*, and of suing or being sued as such. The husband could not grant anything to his wife, or enter into any covenant with her, for that would admit her separate and distinct existence. Nor could she bind him by any contract, or incur any debt, without his consent, with certain exceptions in which there was a legal implication of her authority to act as his agent, and of his liability to pay for necessaries. But in equity her individuality was recognized, and her capacity to hold a separate estate, with the incidental powers of control, management, and disposition admitted, in the same manner as though she were sole.

§ 22. Spanish Law of Marital Rights.

There is a very marked distinction between the rule of the common law and that of the Spanish law, upon the question of marital rights. The latter looked upon the marriage union as a species of partnership in which each might own and control a

separate estate as well as a common interest in a common fund, and accorded many privileges and rights to the wife, that were unknown to the common law, and diametrically opposed to its principles. The one proceeded upon the theory of the merger of the wife's individuality in that of her husband and her consequent inability to own and control a separate estate, while the other recognized her separate existence, and graciously permitted her much the same rights and privileges in that particular as were accorded her husband. He was the head of the family, and was compelled to provide for its wants; the wife obeyed him, and resided where he thought proper. He administered in his own name all her property, and exercised all her civil actions, made her contracts, accepted or renounced all her inheritances or donations; freely alienated his own property and the community, provided it was without the intention of injuring his wife. She might exercise these powers herself by the husband's special permission, or by the authority of the court in a case where he wrongfully denied such permission, or was absent and delay was thought to be dangerous.¹ Ganancial goods, or such as were acquired by either of the spouses, by labor or industry, went into the stock of common property; so of the rents and fruits of such goods as either brought into the marriage; and the husband alone had authority to alienate them without consent of the wife.² Her right to such property was equal to that of her husband, but during his presence he had the right of administration subject to the trust in her favor, and he could make no disposition thereof in fraud of her rights. Her rights in such property were the equivalent of his, the only distinction being, that during coverture her rights were passive, his active. While he enjoyed these rights, he was subject to the corresponding duty of maintaining his wife and family out of this property.³ The wife could not, without the consent of her husband, renounce any inheritance, or accept it unless with an inventory.⁴ The wife's separate estate consisted of whatever estate she might possess at the time of the marriage, and was known as paraphernales; of the portion, or dower, which was a kind of gift by the

¹Schmidt's Civil Law, arts. 36-42.

²Say. Ear. L. of Tex. art. 118.

³Wright v. Hays, 10 Tex. 130.

⁴Schmidt's Civil Law, art. 1275.

question it is now well decided in favor of the validity of such marriages.⁶⁹

And the results and effects of a common-law marriage are precisely the same as of one celebrated according to the requirements of the statute. Thus, one having a common-law husband or wife living cannot contract a second marriage;⁷⁰ their children are legitimate, and each has the same rights, personal, and in property, and otherwise, as where the celebration is statutory. But before such marriage will be sustained, it must be one, not only good according to the common-law rule, but must, in addition, be not in violation of any law of this state. For no marriage in violation of law can be good as a common-law marriage. Thus, a girl under fourteen years of age cannot contract such a marriage.⁷¹

The case of *Western U. Teleg. Co. v. Proctor*, 6 Tex. Civ. App. 300, 25 S. W. 811, decided by our court of civil appeals, holds the contrary of the above doctrine. But the later cases cited, some of which are by the supreme court, clearly support the text. And they announce the correct rule, for laws in derogation of the citizen's rights ought to be so construed as not to deprive one of any right unless the intention to do so be clear. Our statute does not declare marriages not celebrated as therein directed, void. It does declare certain marriages void, thus impliedly recognizing the validity of all others. Thus, males after they pass sixteen, and females after they pass fourteen, years are not forbidden to marry.

But it is not every living together of a man and a woman that will constitute a common-law marriage. Such relation may be illicit, even though both be perfectly competent to contract a valid marriage, for the simple reason that they may not

⁶⁹Cumby v. Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673; Holder v. State, 35 Tex. Crim. Rep. 19, 29 S. W. 793; Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56, S. C. 87 Tex. 647, 30 S. W. 869; Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564, S. C. 88 Tex. 641, 32 S. W. 871; Simmons v. Simmons (Tex.

Civ. App.) 39 S. W. 639; Galveston, H. & S. A. R. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. 135; Schwarz v. Allen (Tex. Civ. App.) 37 S. W. 986.

⁷⁰Chapman v. Chapman, 16 Tex. Civ. App. 382, 41 S. W. 533.

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²Say. Ear. L. of Tex. art. 118.

³Wright v. Hays. 10 Tex. 130.

⁴Schmidt's Civil Law, art. 1275.

wife or someone for her to the husband to enable him to bear the charges of matrimony; of marriage gifts; and of the gifts of the husband to the wife of what was known as the arra.⁵ For the return of the paraphernal property as well as the portion, all the property of the husband was subject to a lien by operation of law. The arra was the separate property of the wife, and passed to her heirs.⁶ The administration of the wife's paraphernales belonged to the wife unless it was expressly conferred upon the husband, yet she could neither alienate it nor appear in court concerning it, without her husband's consent. If the administration was conferred upon the husband, it was considered as an increase of the portion or dower, and was subject to the same rules. Its increase or deterioration belonged to her.⁷

§ 23. Constitutional Provisions.

In the Constitution of the Republic⁸ is found the following provision for the introduction of the rules of the common law as the rule of decision in our Republic: "The Congress shall, as early as practicable, introduce by statute the common law of England, with such modifications as our circumstances in their judgment may require; and in all criminal cases the common law shall be the rule of decision." And in the Constitution of the state adopted in 1845, provision is made for the passage of laws more clearly defining the rights of married women, in the following: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights in relation, as well to her separate property, as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."⁹ The rights of married women to their separate property, real and personal, and the increase of the same, shall be protected by law; and married women, infants, and insane persons shall not be barred

⁵Say. Ear. L. of Tex. art. 119.

⁸Art. 4, § 13, Pas. Dig. p. 34.

⁶Ibid.

⁹Const. 1845, art. 7, § 19; Consts.

⁷Schmidt's Civil Law, arts. 366-370. 1861 and 1866, art. 7, § 19.

of their rights of property by adverse possession, or law of limitation of less than seven years from and after the removal of each and all of their respective legal disabilities.¹⁰

The Constitution of 1876 contains the same provisions as do those of 1845, 1861, and 1866, above quoted.¹¹

§ 24. Act of 1840 Adopting the Common Law.

“The common law of England (so far as it is not inconsistent with the Constitution or the acts of Congress now in force) shall, together with such acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress.”¹² And the same act contains provisions concerning the separate property of the wife, the community property, marriage contracts, etc., etc., all of which will be noticed in their appropriate places.

§ 25. Policy of Our Laws.

From an examination of the preceding provisions and acts, it will be observed that it was evidently not the intention of the framers of our laws to adopt, along with the body of the common law, its rules with reference to marital rights; but rather, with some changes and modifications, to preserve the Spanish-law rule; to steer clear of the conflicting rules of the common law and equity,—the one denying, and the other recognizing, the separate and distinct legal existence of the wife, and to adopt emphatically the doctrine of coequality of the husband and wife so far as individual property rights are concerned. It views the matrimonial union as a species of partnership, in which each may have separate estates as well as a common interest in the common gains and acquisitions.¹³ It has taken a long stride toward the emancipation of woman from a condition which advanced thinkers now consider little less than slavery. The foolish fiction that her existence is merged in that of her husband has given way to the more enlightened recognition of her iden-

¹⁰Const. 1869, art. 12, § 14.

¹²Cartwright v. Hollis, 5 Tex. 152.

¹¹Const. 1876, art. 16, § 15.

¹³Say. Ear. L. of Tex. art. 707;
Rev. Stat. art. 3258.

tity as an individual, and her consequent capacity to own property, to make contracts, and to sue and be sued. Yet, as though fearing serious consequences of much moment, it has not altogether removed her fetters, but is slowly, yet surely, tending, through the course of legislative acts and judicial interpretations, toward the enlargement of her rights and powers, which will in time culminate in a proper recognition of all her civil rights. It is gratifying to notice that the trend of our course is toward enlargement, rather than retrenchment, in this direction.

As a result of the qualified adoption of the common law in the manner above indicated, and of the retention upon the marital relation of the features of the Spanish law, our system may well be denominated a blended system affording to the wife the privileges of the Spanish law, and at the same time extending to her the protections afforded by the common law. We now recognize her right to own property, to convey it, to make contracts, to sue and be sued, in a limited sense it is true, yet indicating a recognition that her civil rights are equal to those of her husband, and that the matter of exercising those rights should be determined by those who are alone interested.

§ 26. Law Governing Prior to 1840.

Before the adoption of the common law it was but natural that questions of law concerning the rights of married persons, and marriage and incidental questions of property rights, should be governed largely by the Spanish law as in force in Mexico.¹⁴

§ 27. Rights of Persons Married Elsewhere.

It matters not that the marriage is solemnized in a foreign state, the marital rights of the parties to the property acquired in this state are the same as though it were solemnized here. The statute so declares,¹⁵ and our courts have uniformly so held.¹⁶ It is a generally accepted doctrine that the law of the matrimonial domicile governs the rights of married persons, where there is no express nuptial contract; but even where there is such a contract it cannot be held to fix the rights of the par-

¹⁴Smith v. Smith, 1 Tex. 621.

¹⁵Castro v. Illies, 22 Tex. 479.

¹⁶Rev. Stat. art. 2975.

ties in another jurisdiction, unless made with special reference thereto, to property acquired after their domiciliating in that other jurisdiction.¹⁷ Nuptial contracts might be so made as to indicate an intention to embrace future acquisitions, and with reference to a change of domicil, in which case the rule would be different, and the contract would govern the marital rights of the parties; but not of third parties who acquired rights without notice of such contract.¹⁸ And where the rights of married persons in property are fixed by the law of any other state, those rights are not disturbed by a change of domicil and removal of the property to this state, nor by a sale and investment of the proceeds.¹⁹ But where property was acquired by the wife while in the course of migration with her husband to this state it was held that her right to the property would be governed by the laws of this state, it being the intended domicil.²⁰

§ 28. Wife's Domicil.

The matrimonial domicil is where the husband resided at the time of the marriage;²¹ but if the parties had, at the time of the celebration of their marriage, an intention of an immediate removal to another state, that latter state would be the place of their domicil.²² The doctrine of the domicil of the wife, or of the family drawing to it that of the husband has never been recognized as the law of this state.²³ It is the general rule that the domicil of the husband is the domicil of the wife.²⁴ Her domicil is drawn to, and follows, his, and he has the right to select it;²⁵ and when selected by him it is her duty to follow, and her

¹⁷Castro v. Illies, 22 Tex. 479.

¹⁸Ibid.; See Hall v. Harris, 11 Tex. 300.

¹⁹Hill v. McDermot, Dallam (Tex.) 419; McIntyre v. Chappell, 4 Tex. 187; Love v. Robertson, 7 Tex. 6; Chappell v. McIntyre, 9 Tex. 161; Hall v. Harris, 11 Tex. 300; Rose v. Houston, 11 Tex. 324; Keyser v. Pilgrim, 25 Tex. Supp. 217.

²⁰State v. Barrow, 14 Tex. 179. See *Conflict of Laws*, post, § 34; *Marriage Settlement*, post, chap. xvi.

²¹McIntyre v. Chappell, 4 Tex. 187.

²²State v. Barrow, 14 Tex. 179.

²³Republic v. Skidmore, 2 Tex. 261; Babb v. Carroll, 21 Tex. 765.

²⁴Russell v. Randolph, 11 Tex. 460; Meyer v. Claus, 15 Tex. 516; Lacey v. Clements, 36 Tex. 661; Ibid. 51 Tex. 150; Henderson v. Ford, 46 Tex. 627; Republic v. Young, Dallam (Tex.) 464.

²⁵Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90; Mitchell v. Nix, 1 Posey, Unrep. Cas. (Tex.) 126.

refusal without sufficient excuse amounts to desertion.²⁶ This power of the husband to select the domicile is not, however, an arbitrary one, but due regard is to be had to the wife's health, comfort, reputation, etc.²⁷

By Federal statute, since 1855, any woman who might herself be lawfully eligible to naturalization, and was then or who might thereafter be married to a citizen of the United States, shall be deemed a citizen.²⁸

§ 29. Husband must Support the Wife.

It is a man's legal, as well as moral, duty to support his wife; and in the sense that his property is liable for such support, he may be compelled to do so. The common fund belonging to himself and wife may be the primary fund out of which such support is to come, yet it is not to that alone he must resort. He must support her from his own property as well. It is not proper for him to resort to her property for this support, as that would not be support by him but by her. He should support her in that style, and furnish her with such things, as are suited to her station in society and the condition of his estate.²⁹ But he cannot be compelled to support her at any other place than at the home he has provided for her, unless he be guilty of cruelty or other conduct such as to justify her in withdrawing from him.³⁰ Where the wife has a separate estate in lands the statute affords a method of compelling a support in a proper case. It provides that, "should the husband fail or refuse to support his wife from the proceeds of the lands she may have, or fail to educate her children as the fortune of the wife would justify, she may, in either case, complain to the county court, which, upon satisfactory proof, shall decree that so much of such proceeds shall be paid to the wife for the support of herself and for the nurture and education of her children as the court may deem necessary."³¹ Nor is the wife confined to this remedy; she may, as will be seen later, herself contract for all necessities,

²⁶Tif. Dom. Rel. 34.

²⁷Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90.

²⁸10 Stat. at L. 604; Kelly v. Owen, 7 Wall. 496, 19 L. ed. 283;

Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666.

²⁹Black v. Bryan, 18 Tex. 453.

³⁰Morgan v. Hughes, 20 Tex. 142.

³¹Rev. Stat. art. 2972.

and pledge the credit of her husband therefor.³² He has no right to resort to her property for the means of support, and cannot charge it for such purpose.³³

The wife's right to a support from her husband continues, too, so long as the relation of husband and wife continues, and is not lost by his abandoning her, where she has not by her own wrong forfeited such right.³⁴

§ 30. His Authority over Her Person.

The common law formerly gave the husband the right over the wife of moderate correction; but no such right is recognized in this state. His authority over her does not extend to the inflicting of corporal punishment, and any violence upon her, except in cases of self-defense, or in the prevention of her unwarrantable interference in the exercise of his parental authority, would be illegal, and punishable as an offense.³⁵ Such treatment by the husband, not only renders him guilty of an offense, but is ground in favor of the wife for a divorce.

§ 31. When He has Abandoned Her or is Insane.

To the general rule that the husband is the head of the family, and as such has the control of all the property, there are certain well-defined exceptions. Where he is in any way incapacitated from performing this duty, it is but natural that the same should fall upon some other person, and the law recognizes the right of the wife, whose interest in their property and children is coequal with that of her husband, to assume that duty. It is plain that if the husband voluntarily deserts his family he cannot exercise the functions of head of the family, and it is equally plain that where his absence is not voluntary, as by confinement in prison, his inability is equally great. In such cases, from necessity, the wife becomes the head of the family to control the

³²See *Contracts*, post, §§ 50-56.

³³*Callahan v. Patterson*, 4 Tex. 61; *Magee v. White*, 23 Tex. 180.

³⁴*Dallas & W. R. Co. v. Spicker*, 61 Tex. 427; *Fort Worth & D. C. R. Co.*

v. Floyd (Tex. Civ. App.) 21 S. W. 544.

³⁵*Gorman v. State*, 42 Tex. 221; *Owen v. State*, 7 Tex. App. 329; *Loring v. Loring*, 17 Tex. Civ. App. 95; 42 S. W. 642.

domestic affairs, make its contracts and conveyances, and to transact its business generally.³⁶ Upon this principle it was decided in *Forbes v. Moore*, 32 Tex. 196, that the wife would have the right during the insanity of her husband to assume control and dispose of, not only her separate property, but the community, and also so much of her husband's separate property as would be necessary for the support of herself and family; and again intimated in *Cason v. Laney* (Tex. Civ. App.) 27 S. W. 420, that she would probably have no authority to dispose of any more of the community property, or of her husband's property, than was sufficient to supply the wants of herself and family. But this is not now the law, for statutes have been interposed,³⁷ which authorize the appointment of a guardian in such cases, and if any resort by the wife be had to the husband's separate property, or to the community property, such resort must be through our probate court.³⁸ The same is true of her suit for the recovery of community property. It should be maintained by the guardian of her insane husband.³⁹ If, under the statute regulating such matters, no administration was authorized, then the community property passes to the sane wife, and she may, of course, do with it as she pleases.⁴⁰

§ 32. Married Women as Agents, Trustees, etc.

There is nothing in our laws which incapacitates a married woman from acting in representative capacities, such as agent, trustee, executrix, or guardian. Certain powers are denied her, not because she has no separate identity, but because of the husband's supposed superior right to exercise them during coverture. If she be authorized then, she may represent another as agent or trustee. She is frequently the agent of her husband, either expressly or impliedly. Her ordinary purchases in the details of her domestic affairs furnish familiar illustrations. When acting as agent she, of course, binds her principal, but, unlike other agents, she cannot bind herself. The question is

³⁶*Post*, § 51.

³⁷Rev. Stat. art. 2735.

³⁸*Heidenheimer v. Thomas*, 63 Tex.

³⁹*Texas & P. R. Co. v. Bailey*, 83 Tex. 19, 18 S. W. 481.

⁴⁰See *post*, §§ 118, 119.

not free from embarrassment. While in the sense that she may bind her principal she may be an agent, yet she may not be an agent in the sense that she may make a contract of agency such as will entitle her to an enforcement or make her liable for a noncompliance; for as her time is her husband's he alone, as agent of the community, is authorized to contract concerning it, or to sue for her remuneration for services, even if contracted by his consent. And if she accept employment with her husband's consent the contract is his, and not hers. But, so far as the business of her principal and the interests of third persons dealing with her are concerned, she may do all things necessary in the prosecution of the business, or the execution of the trust, as though she were sole. Her husband's joinder or assent are not necessary to the validity of her acts. He has no substantial rights in property to which she holds only the bare legal title.⁴¹

§ 33. Suffrage; Holding Public Office.

Only male persons, subject to none of the disqualifications named by law, are authorized to exercise the right of suffrage. This as a disability is not peculiar to married women.

Akin to the questions discussed in the preceding section is the right of a married woman to hold a public office. There is nothing in our constitutions or statutes, so far as the writer has observed, which in any way prohibits women generally from holding any elective or appointive office within this state, save, possibly, membership in the two branches of the legislature, where one of the requirements is that members shall be qualified electors.⁴² The use of the words "he" and "his," in connection with the provisions and acts concerning such officers, is in a generic sense, and includes females as well as males.⁴³ The only general provision concerning the qualifications of officers is to be found in article 1810*a* of the Revised Statutes,⁴⁴ and is merely a residence qualification. Marriage would not incapacitate a woman from holding official position if she was otherwise eligi-

⁴¹Stewart, Mar. & Div. 482. See *Guardianships*, *post*, chap. xii.

⁴²Const. art. 3, §§ 6, 7.

⁴³See *State ex rel. Crow v. Hostet-*
M. W.—3.

ter, 137 Mo. 636, 38 L. R. A. 208, 39 S. W. 270.

⁴⁴Const. art. 16, § 14.

ble. But her inability to contract might prevent her becoming liable upon an official bond, where one is required.

§ 34. Conflict of Laws Generally.

Every state has the right to determine for itself the rights and conditions of persons and things within its borders, and it is only by comity that it allows such rights and conditions to be determined by other jurisdictions or affected by their laws. More will be seen of this in subsequent sections, but it is here proper to notice a few of the general principles applicable. Courts do not take judicial notice of the laws of another state, hence, where they become material, they should be alleged and proved.⁴⁵ If not done the presumption is that the law of such other state is the same as ours.⁴⁶ Generally the law of the matrimonial domicile governs the status of the parties, the legitimacy of their children, and their property rights in movables. This matrimonial domicile may be the place of the husband's actual residence at the time of marriage, the intended residence of the parties at such time, or it may be the new residence acquired after marriage. The residence of the wife at or prior to her marriage has little or nothing to do with the question, as we have seen that her domicile is drawn to that of her husband. As to immovables, the law of the state where the same are situated will govern.⁴⁷ All transactions affecting such immovables, such as contracts, conveyances, or wills, must be in accordance with the laws of the place where such property is situated, no matter how different they may be from the laws of the matrimonial domicile. And whether property is movable or immovable will also depend upon the law of the state where situated.⁴⁸ While the personal status of parties is determined by the law of the matrimonial domicile, yet the personal acts, as the wife's contracts, and crimes, are governed by the law where done or committed. Whatever may be the rights of a married woman, in enforcing them, she

⁴⁵Tompkins v. Williams, 7 Tex. Civ. App. 602, 25 S. W. 158.

⁴⁶Blethen v. Bonner (Tex. Civ. App.) 52 S. W. 571. But see Mexican C. R. Co. v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778, for a

modification of this rule. Clardy v. Wilson (Tex. Civ. App.) 58 S. W. 52.

⁴⁷Castro v. Illies. 22 Tex. 479.

⁴⁸Newcomer v. Orem, 2 Md. 297, 56 Am. Dec. 297.

will be governed in matters of procedure, the introduction of evidence and the like, by the law of the forum.⁴⁹ With respect to immovables, the capacity to will, the power to dispose of the property willed, as well as the form and execution of the same generally, will be governed by the law of the place where situated; and as to movables, by the law of actual matrimonial domicil.⁵⁰

⁴⁹Stewart, Hus. & Wife, § 35.

⁵⁰Ibid. § 36.

CHAPTER III

HUSBAND AS WIFE'S AGENT.

§ 35. In General.

§ 36. To Manage Her Separate Property.

§ 37. To Charge or Convey Her Separate Property.

§ 38. His Liability for Any Conversion of Her Property.

§ 39. His Authority to Sign Her Name.

§ 40. To Manage Her Business.

§ 41. Her Power of Attorney to Him.

§ 42. How Far Wife Bound; Ratification.

§ 35. In General.

The husband may be appointed as the wife's agent; he is not necessarily such. It cannot be presumed that because he is her husband he is likewise her agent, for this relation of principal and agent is one of fact to be proved, and not presumed.¹ He has no authority to act for her in such manner as to bind her separate interests, unless he is expressly or impliedly authorized to do so, and there is with us no implication of law that he is so authorized in fact.² Where he is authorized to act for her their transactions and mutual powers and rights are governed by the law as ordinarily applicable to principal and agent, except as may hereafter be explained. His authority as her agent in fact may be revoked in the usual ways, such as a withdrawal of her permission, or by her death and the like.

In the very nature of things, slight proof would be sufficient to establish between the husband and wife the further relation of principal and agent. In more than one of the states this is implied as matter of law.³ But until such fact of agency is established in some satisfactory way, those desiring to affect the wife individually or her estate must deal with her individually in the manner pointed out by law, and not with her husband, except in the matter of exercising his statutory right of control over her separate property. So that, it follows that a notice,

¹Magee v. White, 23 Tex. 180.

²Etheridge v. Price, 73 Tex. 597, 11 S. W. 1039.

³Mobley v. Leophart, 47 Ala. 257;

Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 293; American Exp. Co. v. Lankford (Ind. Terr.) 39 S. W. 817.

where necessary to the wife, would not be such if given to her husband. Payment to him of money owing to her would be satisfaction for reasons hereafter given.

The law constitutes him her agent for certain purposes, as will be immediately noticed, and her consent or authority in such transactions is not essential to the validity of his acts, or necessary to the exercise of his power.

§ 36. To Manage Her Separate Property.

The husband during marriage has the sole management of the wife's separate property,⁴ as well as her interest in the community property. But as to the separate property this authority extends no farther than to the possession, management, and control of it. To these, he has a right, not only superior to strangers, but to the rights of his wife as well. It is a right conferred by law, and not by her authority or consent, and may in point of fact be contrary to her wishes. He is entitled to take possession and control of her property wherever found, and she herself cannot interfere except it be to prevent a destruction or conversion of it. He may reduce her choses in action to possession by suit or otherwise, may check out her deposits in bank,⁵ receive her rents, collect her debts,⁶ and to this end may restrain a third person from collecting, or in any manner disposing of, her notes,⁷ and in any and all ways deal with her property as with his own, save that he cannot charge or convey it. His statutory right to control would probably authorize him to hire or lease her property for a reasonable time, and to collect the hire and rents thereof, as he is entitled to this use. And his lease thus made would be enforceable if it did not in any way endanger the *corpus* of her property, for this he cannot do without her consent. By marriage she loses all right to the possession⁸ and control of her property except by the permission of her husband, and then it is his control through her as agent, revocable at any time, since they cannot by mere agreement change their status or rights.

Where the separate property of a married woman is stolen,

⁴Rev. Stat. art. 2967.

⁵Douglas v. Baker, 79 Tex. 499, 15

⁶Coleman v. First Nat. Bank, 17 S. W. 801.

Tex. Civ. App. 132, 43 S. W. 938.

⁷Clay v. Power, 24 Tex. 304.

⁸Brown v. Brown, 61 Tex. 56.

this possession of the husband is sufficient to support an allegation of ownership in him; or the indictment may charge the ownership in the wife.^{8'} But it does not follow from this that in such criminal pleadings the property of the husband may be alleged to belong to the wife,^{8''} for in the former case the possession of the husband is the necessary result of our legislation upon the marital rights,—the wife being incapacitated to exercise an exclusive control,—whilst in the latter, the wife not having a control over, or right to the possession of, her husband's property, the allegation of ownership should be in him.

§ 37. To Charge or Convey Her Separate Property.

But this power to control does not go to the extent of authorizing the husband to charge or encumber the wife's property, even in contracts concerning such property. In *Adamson v. Shiel* (Tex. App.) 18 S. W. 464, Shiel sued Adamson and wife to recover a sum of money due him for plastering a dwelling house, the separate property of the defendant Mrs. Adamson, claiming that one Cook, the original contractor of the building, had been authorized by defendants to employ any whom he might see fit to do the plastering, and that Cook had employed plaintiff. The trial court charged the jury: "If you believe . . . that . . . Cook, at the time he made the contract with plaintiff for the plastering of the house, . . . had authority from defendants, or either of them, to employ plaintiff, and to make the contract for them, and to bind the defendants to pay for the same, then it will be your duty to find for the plaintiff against both defendants." This the appellate court held erroneous, because the husband could not authorize Cook to employ the plaintiff to plaster the house, the separate property of the wife, and thereby bind her and her separate property, unless the same was done with her knowledge, and by her authority and consent.

Nor can he alienate her separate property or any part of it by virtue of his right to possess and control. In the case of real

^{8'}Code Crim. Proc. art. 445.

^{8''}*Lucas v. State*, 36 Tex. Crim. Rep. 397, 37 S. W. 427.

property he cannot, even if she authorize him, convey it, as the law expressly provides the only way in which such property may be conveyed.⁹ In *Smith v. Tripis*, 2 Tex. Civ. App. 267, 21 S. W. 722, Tripis sued Smith and wife for a balance due him as commissions for selling real estate belonging to the wife. Mrs. Smith pleaded in reconvention for \$1,000 already paid to plaintiff by her husband out of the proceeds of said land, which was her separate property. She alleged the want of authority upon the part of her husband to make the contract with plaintiff to pay him such commissions, denied that she had ever consummated the sale, that she had ever recognized the plaintiff as her agent in the sale of the land, and that she had ever paid or agreed to pay plaintiff any sum of money for his services, etc. It was held that the plea showed a cause of action in her favor. The husband has no authority without his wife's consent, expressed in the proper manner, to employ services which are even necessary to the preservation, and for the benefit, of her separate property, and to compensate the same by a conveyance of a portion of such property being realty.¹⁰ In the case cited it is said: "It is contended under the facts that Dr. Owens, by reason of the agency imposed upon him by law concerning the separate property of his wife, had the authority to employ Walker in his capacity as attorney at law, to find the instrument executed in 1838 by Slaughter, and to establish the title of Mrs. Owens thereunder; the contention being that, as the instrument was lost, and as Mrs. Owens's rights in the premises were uncertain, her husband without her consent, expressed in the manner required by law, could make a valid contract binding her interest in the property conveyed by the instrument, and that his acts in this direction were for the preservation and benefit of her separate estate, and his conduct in this matter was not adverse to the interest of his wife. The statute undertakes to prescribe the power of the husband, and to that alone must he look for his authority in the premises. . . . And the rule is as stated in *Warren v. Smith*, 44 Tex. 245, that to make the separate property of the wife liable, the

⁹*Post*, chap. VI; *Fisk v. Flores*, 43 Tex. 340.

11 Tex. Civ. App. 284, 32 S. W. 189, 1057.

¹⁰*Owen v. New York & T. Land Co.*

contract must be by the wife herself, or by her authority; and the effect of that case was to hold that the husband had no such agency by reason of his power to manage her property." Nor can the husband, after services performed for the benefit of the wife's separate property under a contract that is not binding upon her, ratify such contract so as to make it thus binding. He is as incapable of ratifying as of making in the first place.¹¹ Nor is her separate estate equitably chargeable with such services upon the theory that they were necessary.¹² She alone is to judge of their necessity; the husband is not so authorized.

So of her personal property. He cannot alienate or charge it without her consent.¹³ A negotiable promissory note belonging to the wife and payable to her or her order cannot be transferred by her husband without her consent, and parties having notice of her right would acquire no title thereto by such unauthorized act of her husband.¹⁴ His power to manage no more authorizes him to sell her personal property than it does her real property. The only distinction is that she may orally consent to his sale of her personalty, whereas she cannot with reference to her realty.

He can do no act that will endanger the title of her property, real or personal,¹⁵ or interfere with the free and beneficial use thereof, for it may not always be his to administer. Hence, he has no authority to create a perpetual easement in her land by a conveyance of a right of way there across to a railway company.¹⁶ And in such case she is not precluded from recovering her property for the reason that she made no objection to the building of the road, nor any complaint thereof for four or five years.¹⁷ Nor has he the power, without her consent, to make agreements in suits pending, by which her rights to her separate

¹¹Smith v. Powell, 5 Tex. Civ. App. 373, 23 S. W. 1109.

¹²Ibid.

¹³Therriault v. Compere (Tex. Civ. App.) 47 S. W. 750.

¹⁴Hamilton v. Brooks, 51 Tex. 142; Morris v. Edwards, 1 Tex. App. Civ. Cas. (White & W.) § 548; Kempner v. Comer, 73 Tex. 196, 11 S. W. 194.

¹⁵McKay v. Treadwell, 8 Tex. 176.

¹⁶Texas Trunk R. Co. v. Hall (Tex. Civ. App.) 24 S. W. 324; Texas & P. R. Co. v. Durrett, 57 Tex. 48; Gulf C. & S. F. R. Co. v. Donahoo, 59 Tex. 128.

¹⁷Texas Trunk R. Co. v. Hall (Tex. Civ. App.) 24 S. W. 324.

property or the homestead are affected. He cannot so bind her.¹⁸

§ 38. His Liability for Any Conversion of Her Property.

“While a husband does not here hold title to his wife’s separate estate in trust for her, as he is held to do in England and in the states of this Union generally, when a conveyance is made to a wife for her separate use and benefit, and no trustee named, yet it does not follow from this that the husband is not, as to the wife’s separate property, essentially a trustee, charged with duties, for the violation of which any estate subject to the payment of his debts will be liable. A person is said to be a trustee in whom a power over property, or affecting it, vests for the benefit of another; and a person having such power is as essentially a trustee as is one in whom the title to the property which he has the right to control is vested for the benefit of another. The husband is here made by statute the trustee for the wife, with power to manage and control her separate property; and we see no reason why he shall not be held to the duties and liabilities which ordinarily attach to that relation. So long as he manages the separate estate of his wife with reasonable care, not diverting it from the purpose for which the law places it in his hands and control, though loss may result from his management he is not liable therefor. But can it be said that such a trustee may convert the separate estate of the wife into money or other property, and appropriate that to the benefit of himself, or to the benefit of the community, and not be liable for its value? If the wife’s separate estate consists in money or in securities which he may convert into money legally, may he pay a debt of his own, for which the wife’s separate estate is in no way liable, with it? May he mingle such separate estate with funds of his own or of the community so that it cannot be identified, or may he so invest it in property in his own name that it cannot be followed, and thereby escape liability? If so, the separate estate of a married woman, notwithstanding the solicitude shown by the legislature to protect it, has no pro-

¹⁸Winter v. Texas Land & Loan Co.
(Tex. Civ. App.) 54 S. W. 802.

tection at all, and the husband, whose duty it is to preserve, has the unrestrained power to destroy, such estate, unless it consists in such things as the husband cannot dispose of without the wife's consent, in which case the wife may preserve her estate by refusing to sell, and thus keep up its identity. The rule is that every trustee is liable for the diversion of a trust fund, and upon the death of a trustee this liability rests upon his legal representative, and must be satisfied out of such funds in his hands as are subject to the payment of the claims of creditors generally. That the husband is made a trustee by operation of law does not change the rule."¹⁹

The relation which the husband occupies to the property which his wife brings him upon marriage bears a very close analogy to the relation of the husband to the wife's dower and paraphernalia under the civil law, where she did not retain the administration of her paraphernal property. There it was the husband's undertaking to restore these upon the happening of a variety of contingencies; as, if the marriage be declared null and void, or if she die without children before her husband. And if the husband died without leaving issue of the marriage his heirs were compelled to restore them. The husband or heirs restoring the dotal property were required to do so in the same condition in which such property was received, but not the interest or fruits or revenues of such property produced during marriage.²⁰

If the husband uses the wife's property upon a promise to pay for it he is liable upon his contract; if he uses it without her permission, and without a promise to repay it, he is liable for its conversion.²¹

If the doctrine of tacit mortgage upon the husband's estate in favor of the wife under such circumstances ever existed in our state the same has never been recognized by our courts since the earliest statutes defining the marital rights.²² She is no more

¹⁹Richardson v. Hutchins, 68 Tex. 81, 3 S. W. 276.

²⁰Schmidt's Civil Law, arts. 355-370.

²¹Coleman v. First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938.

²²Hall v. Harris, 11 Tex. 300.

than a creditor of the husband to the extent of his conversion, and entitled to payment as other general creditors.²³

The husband cannot be guilty of the theft of his wife's property, unless there has been a distinct and definite separation whereby he has expressly or by direct implication abandoned its possession to her, for otherwise the taking would not be wrongful.²⁴

If he uses it to improve his separate property such property is liable to her for reimbursement so long as it remains in the hands of the husband or his heirs, but the heirs are not liable personally.²⁵

§ 39. His Authority to Sign Her Name.

At common law the husband's indorsement of the wife's name would be sufficient to pass title to her promissory notes, because all her property vested in him, but such is not the law of this state. With us the wife's personal, as well as real, property vests and remains vested in her. Her notes are but her personal property and subject to much the same rules as are applicable to that class of property generally.²⁶ If the husband pledge the wife's negotiable paper payable to bearer before maturity, but no advance be made upon it till after maturity, her rights are not affected in the absence of consent or ratification.²⁷ Or if he transfers such property without her consent to persons having notice of her rights, even for value, they take no title. It does not follow from this, however, that if they had no notice they would take the title, but rather that it upholds the principle that he has no legal right to convey her notes. If her note is payable to bearer or to her order, and is indorsed by her, and in such condition he transfers it to an innocent holder before maturity, the title passes, because the possession of such paper is prima facie evidence of ownership, and he could pass the title of a stranger's note in the same way. But no satisfactory rea-

²³Continental Nat. Bank v. Weems,
69 Tex. 499, 6 S. W. 802.

²⁴Overton v. State, 43 Tex. 616.

²⁵Parrish v. Williams (Tex. Civ.
App.) 53 S. W. 79.

²⁶Ante, § 37.

²⁷Texas Ins. & Bkg. Co. v. Turn-
ley, 61 Tex. 365.

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²⁵Parrish v. Williams (Tex. Civ. App.) 53 S. W. 79.

²⁶Ante, § 37.

²⁷Texas Ins. & Bkg. Co. v. Turnley, 61 Tex. 365.

son can be given for the husband's authority, as such, to convey, by indorsement or otherwise, the wife's promissory note without her consent.²⁸ There is no reason why the wife's note should be an exception to the rule denying the husband the right to alienate her property, and to say that by an unauthorized indorsement he could convey her title to such property. This would plainly contravene every principle of law. The husband no more than any other person can convey that which does not belong to him, and an unauthorized signing of his wife's name would not give him the power to do so. What is here said presupposes that such notes show upon their face the wife's separate interest. For if they are payable simply to her without apt words limiting the same to her separate use, it will be presumed to be community property, and subject to the disposition of the husband alone. He might transfer by his own indorsement then as well as by that of his wife; and those taking it relying upon such presumption would have good title.²⁹

§ 40. To Manage Her Business.

If the wife owns separate property consisting of a mercantile or other trading business, the husband is by law entitled to its possession and management; and, being thus managed by him as her agent appointed by law, no presumption of fraud can arise, nor presumption of his ownership if she acquired it before their marriage, for his possession and management are hers through him as agent.³⁰

§ 41. Her Power of Attorney to Him.

While the wife may lawfully designate her husband as her agent the same as she may any other person for the purpose of conveying her personal property, still it will be seen that, in view of the statutory requirements concerning the conveyances of the wife's separate lands, a conveyance made by the husband by virtue of a power of attorney, signed by the wife alone, is not such an instrument as the statute makes effective to pass her title,

²⁸Kempner v. Comer, 73 Tex. 196, Cas. (Tex.) 158. See *post*, § 233.
11 S. W. 194.

²⁹See *post*, chap. VIII.

³⁰Linn v. Willis, 1 Posey, Unrep.

and although it may clearly appear that she acted with her husband's assent.³¹ The husband cannot be both grantor and grantee; to join in such an instrument with his wife to himself would make him such. It is not because the statute does not provide for the wife's power of attorney to her husband that such an instrument confers no power, for indeed the statute nowhere authorizes the wife to make a power of attorney to anyone, yet we know she may do so; but it is because of the impossibility of the husband's joining her in such an instrument. Such instrument being void, the husband's deeds executed by virtue of it convey nothing.³² But she may subsequently, if joined by her husband, by a duly acknowledged instrument ratify such defective conveyance.³³

She may authorize her husband by such an instrument to convey her personal property, for this does not contravene the statutes referred to. Indeed, she may so authorize him orally.

§ 42. How Far Wife Bound; Ratification.

The wife is not bound by the unauthorized acts of her husband, unless she subsequently, upon a full knowledge of the facts, ratifies his conduct.

In *Etheridge v. Price*, 73 Tex. 597, 11 S. W. 1039, the husband sold the wife's land to Price, and pointed out to him a certain boundary as the west line of such land, when the true boundary line was several hundred varas east of the line so designated. The wife signed the deed, containing a general warranty, accepted the notes, received the cash payment, in ignorance of her husband's representations. The court held her not bound by such representations, for "in a ratification of a sale made by her husband, how can she act understandingly of obligations that arise from representations made, out of her presence, by her husband, without her knowledge or authority, which representations are not contained in her deed?"

³¹Cannon v. Boutwell, 53 Tex. 626.

³²Halbert v. Brown, 9 Tex. Civ. App. 335, 31 S. W. 535; Peak v. Brinson, 71 Tex. 310, 11 S. W. 269; Reagan v. Holliman, 34 Tex. 403; Cardwell v. Rogers, 76 Tex. 37, 12 S.

W. 1006; Henderson v. Beaton, 1 Posey, Unrep. Cas. (Tex.) 17; Chaison v. Beauchamp Bros. 12 Tex. Civ. App. 109, 34 S. W. 303.

³³Scales v. Johnson (Tex. Civ. App.) 41 S. W. 828.

The general rule may be stated to be, that, in order to bind the wife by the act of the husband, he must be previously authorized to act as her agent in such matter, or she must subsequently, with a full knowledge of the facts, ratify his act. And it is fitting here to observe that the evidence necessary to establish a ratification by the wife of the contract of her husband as her agent should be of a stronger and more satisfactory character than that required to establish a ratification between parties not so situated. The law will not require of the wife an express repudiation of her husband's acts, probably at the expense of the conjugal peace. Intentional ratification ought to be shown before she or her property should be bound. Again, it must not be supposed that mere ratification will in all cases make valid the acts of the husband concerning the wife's property. It will not. The law prescribes certain modes of conveying her property according to its character, and where this is true that mode must be observed. It cannot be waived. She may ratify her husband's unauthorized sale of her personal property, by accepting the proceeds or doing any act that would indicate an intention to ratify,³⁴ but she cannot so ratify his sale of her lands, for the reason that a conveyance by the husband of her lands, with her consent even, is not the manner pointed out by law as the exclusive method of conveying this character of property. To ratify is only tantamount to an assent in the first place. It can never be equivalent to a deed and separate acknowledgment.

In doing those things necessary in the exercise of his statutory control of her property, she is unconditionally bound, not on the principle of ratification, for she may never ratify, nor yet because she authorized them, for she may not have done so, but because he is the special agent appointed by law to do those specific things for her, and by all such acts short of positive fraud she is compelled to abide. The principle is that she is bound by his authorized acts, whether at her instance or at the law's suggestion, and by those not authorized, but which are subsequently ratified by her, if there be no rule of law contravened in the act.

Where he acts as her agent, the rule of notice to the agent as

³⁴Woodward v. McNeill, 75 Tex.
146, 13 S. W. 222.

affecting the principal is applicable. But as in other cases the notice must have been acquired by the husband while he was engaged in the transaction of the particular business of the wife, and under such circumstances as that a failure to communicate it to her would amount to a breach of trust. But if, while engaged in representing her, notice comes to him it is imputable to her; so that she cannot avail herself of his fraudulent conduct in her behalf upon the plea that she had no notice thereof. She cannot profit by his act, and at the same time avoid the consequences of his knowledge discovered in the same transaction.³⁵

³⁵Allen v. Garrison, 92 Tex. 546,
50 S. W. 335; S. C. (Tex. Civ. App.)
48 S. W. 554.

CHAPTER IV.

WIFE'S CONTRACTS.

- § 43. At Common Law.
- § 44. Prior to the Act of 1840.
- § 45. Statutes; Their Scope and Object.
- § 46. Cannot Bind Herself Generally.
- § 47. Presumptions from Her Name Appearing on Paper.
- § 48. Undue Influence of Her Husband.
- § 49. Contracts with Her Husband.
- § 50. Can Bind Her Husband, When.
- § 51. — for Necessaries for Herself and Children.
- § 52. — the Rule Stated by Parsons.
- § 53. — by Chief Justice Hemphill.
- § 54. What are Necessaries; Illustrations.
- § 55. When Credit Extended to the Wife.
- § 56. Can Bind Herself for Necessaries.
- § 57. But Debt should be Contracted Personally.
- § 58. Necessaries for Husband.
- § 59. Her Estate Liable, When.
- § 60. Concerning Her Separate Estate.
- § 61. — whether Husband Liable upon Such Contracts.
- § 62. May Transfer Her Notes.
- § 63. May Release Her Cause of Action.
- § 64. May Make Partition Deeds.
- § 65. Concerning Boundary Lines of Her Property.
- § 66. May Employ Counsel.
- § 67. As Agent of Her Husband.
- § 68. Her Warranty.
- § 69. For Acquisition of Land.
- § 70. Her Liability for Unpaid Purchase Money.
- § 71. Her Right to Rescind; Recovery Back.
- § 72. — Returning Benefits.
- § 73. Her Contracts of Insurance.
- § 74. For Sale of Land.
- § 75. Of Suretyship.
- § 76. — Bonds.
- § 77. As Stockholder in Certain Corporations.
- § 78. May Dedicate Property to Public Use.

§ 43. At Common Law.

At common law, since the existence of the wife was by fiction of law merged in her husband she could, of course, make no contracts. Her sole power to make contracts at all was dependent upon his authority expressly given her to act for him, or im-

pliedly given by law for the purchase of such things as necessities for herself and children. While this fiction of unity was a creature of the common law, and is said to be not recognized by us, yet it is to this alone that all the disabilities of coverture are traceable. It accounts for her inability to contract with strangers, with her husband, her inability to make conveyances, and to sue and be sued. We have only in part forsaken it. By that fiction she could make no contract binding herself or her separate estate. In equity, however, she might bind her estate, but not herself personally.¹ All her contracts, agreements, covenants, promises, and representations were regarded as void for the reason already stated. For the law has always required that there should be at least two parties to every contract, and the wife, not being *sui juris*, was not able to meet this requirement.

§ 44. Prior to the Act of 1840.

Even with us prior to the adoption of the common law, and while the Spanish law obtained, she could make no contract except with the assent of her husband.² And the general rule was that in the disposition of her paraphernal property this assent had to appear upon the instrument conveying, or must at least be given. But this was not without exceptions. He might ratify the act done without his assent, either before or after it was done. The law assumed as a basis for requiring this assent that any disposition of the wife's property would be injurious to the husband, inasmuch as he was entitled to the use and fruits of such property for the support of the family. Hence, a disposition of it without his assent might operate as a prejudice to this right. However, since this was the test and the reason for requiring such assent, if he refused, and it appeared that the proposed contract was an advantageous one to the wife, and therefore to him, the court could confer such authority upon the wife, contrary to her husband's wishes.³ Even where the contract was made by her without his assent or the permission of the court, nevertheless, if it appeared that such contracts were advantageous to her, and not to his prejudice, they would be up-

¹Cartwright v. Hollis, 5 Tex. 152;
Kavanaugh v. Brown, 1 Tex. 481.

M. W.—4.

²Schmidt's Civil Law, art. 482.

³Hollis v. Francois, 5 Tex. 195.

held as valid.⁴ His assent might be presumed after a great lapse of time, in which he acquiesced in his wife's transfer of her property.⁵

§ 45. Statutes; Their Scope and Object.

The wife may contract debts for necessities furnished herself or children, and for all expenses which may have been incurred for the benefit of her separate property.⁶ While we have discarded the fiction of the unity of husband and wife, it is plain that our lawmakers did not intend to fully emancipate the wife and permit her to exercise all the civil rights accorded to the unmarried. And the special authority to make the contracts enumerated fairly indicates that it was intended to restrict her power to those reasonably falling within that class. Those expressly mentioned, together with those contemplated therein as determined by judicial interpretation, are the exclusive instances where she can create a liability against herself by contract, and the courts have uniformly been exceedingly careful that the contract was fairly embraced within the statute before permitting a recovery, for the statute further requires that such should satisfactorily appear to authorize a judgment.⁷ These acts must be held to have forbidden any other contractual liability upon her part. The liability growing out of these contracts is a personal one, and such contracts are not dependent upon the assent of her husband for their validity.⁸

The object doubtless was to provide a rule, complete within itself, for the determination of the wife's powers to bind herself and property, and not leave such to be determined by the rules of the common law, nor yet the Spanish law, from both of which systems ours differs in very material matters.

§ 46. Cannot Bind Herself Generally.

So that, with us, the general rule is, as at common law, that the wife cannot by contract bind herself or her separate property. The act of 1840 adopting the common law, but securing

⁴Harvey v. Hill, 7 Tex. 591.

⁵Poor v. Boyce, 12 Tex. 440.

⁶Rev. Stat. art. 2970.

⁷Ibid. art. 2971.

⁸Booth v. Cotton, 13 Tex. 359.

to the wife her separate property, did not in any manner authorize her to make any contract whatever, and imposed upon her no liability to be sued upon any contract she may have entered into during coverture; the object being simply to guard her separate estate.⁹ The act did not in any way alter the rule at common law, as to her capacity to contract, and hence the early influence, and in a measure the adoption, of the common-law rule of the wife's disabilities. So, in view of the influence of the common law thus exerted, and of the obvious policy of our laws to restrict the general power of the wife to contract, it is well settled that she cannot make a binding contract upon herself, except it be for a purpose pointed out by law, and in the manner provided by law if such manner be provided. Unless a demand is premised upon these things, no liability appears.¹⁰ She is *prima facie* unable to contract at all. The exception authorizing her to act must be alleged and proved.

§ 47. Presumptions from Her Name Appearing on Paper.

From what has just been said it will be seen that no presumption will be indulged to the effect that the wife is liable, or her property, from the mere fact that her name appears upon the instrument by which her liability is sought to be established.¹¹ The presumption is to the contrary. One asserting her liability must show the particular facts authorizing her to create such liability. It will not be presumed that because she did contract, she was authorized to do so. The mere name appearing is no more than *prima facie* evidence that she attempted to contract; it has nothing to do with her capacity to make the particular obligation.

Hence, a bona fide purchaser of her negotiable note is in no better position than the payee. The only answer to a plea of

⁹Kavanaugh v. Brown, 1 Tex. 481.

¹⁰Trimble v. Miller, 24 Tex. 214; Covington v. Burleson, 28 Tex. 368; Lynch v. Elkes, 21 Tex. 229; Haynes v. Stovall, 23 Tex. 625; Menard v. Sydnor, 29 Tex. 257; Taylor v. Bonnett, 38 Tex. 521; Rhodes v. Gibbs, 39 Tex. 432; Magee v. White, 23 Tex.

180; Brown v. Ector, 19 Tex. 346; Booth v. Cotton, 13 Tex. 359; Stansbury v. Nichols, 30 Tex. 145; Smotridge v. Lovell, 35 Tex. 58; Perkins v. Baker, 38 Tex. 45; Harris v. Williams, 44 Tex. 124; Noel v. Clark (Tex. Civ. App.) 60 S. W. 356.

¹¹Harris v. Finberg, 46 Tex. 79.

coverture would be an allegation of capacity to make the particular contract.

In a proceeding wherein the husband and wife were jointly sued, the husband indorsed upon the back of the petition the signatures of himself and wife, waiving the issuance and service of citations in the suit: the court held the waiver sufficient upon its face to authorize the proceedings against both, and thought it would be going to a "romantic length" to indulge the presumption that a husband in any case would commit a fraud upon his wife by bringing her into court without her knowledge or consent, or that he would collude with others to her injury.¹² It will be seen, however, that this presumption goes only to the extent of holding that the wife's signature appeared by her authority, that it was not forged: and does not in any way go to her liability upon the debt sued on. In other words, that the signature was hers, not the debt.

§ 48. Undue Influence of Her Husband.

The courts will relieve the wife from the undue influence of her husband in matters of contract affecting prejudicially her separate interests. The influence which has the effect of invalidating her act is such as arises from the exercise of his power over her in such a way as virtually to deprive her of her capacity to act as a free agent.¹³ Mere appeals to her sympathies and feelings, urging her to relieve him from financial pressure, would not be sufficient to relieve her. If she be left free to assent or dissent as she may see proper, the mere fact that she has been pressed by his urgent entreaties, the transaction being otherwise free from fraud and duress, affords no ground for relief.

§ 49. Contracts with Her Husband.

For a proper understanding of this immediate subject, it is well to bear in mind the distinction between personal contracts and contracts in the form of conveyances of property. Only the first is here referred to. The latter is treated separately.¹⁴

¹²Laird v. Thomas, 22 Tex. 276.

¹³Post, chap. V.

¹⁴Shelby v. Burtis, 18 Tex. 644.

On the theory that husband and wife are one, which theory, as said by Mr. Stewart,¹⁵ has never been, and is nowhere, logically and broadly applied, but which in every place where the common law is known, influences the status of married persons, husband and wife cannot contract with each other.¹⁶ But this inability to contract with her husband is no greater than her inability to contract with others, for it proceeds from the same disabilities. Logically she has precisely the same right to contract with him as with a stranger. If his assent is necessary to any of her transactions, certainly it will be evidenced in a contract with him. But it is proper to say here that with her ability to contract his assent has nothing to do. If she be authorized to contract in a particular instance, his assent is not required, and if she be not, his assent cannot confer the capacity upon her, even if he joins with her in the undertaking. He would thus bind himself only, and not her. The policy of the law is to preserve the intimacy of the marriage relation, and to this end it discourages contracting between the parties, which at best is liable to beget adversity of interests. The statutory subject of her contracts, as to necessities for herself and children, is, of course, out of the question in the matter of contracting with her husband. She might contract with him for the expenses for the benefit of her separate property as with a stranger. Nothing hinders this. But in making such contract she must exercise her own will, and the husband cannot be her agent for making such contract, for no one can contract with himself.¹⁷ She may, as has been seen,¹⁸ appoint him her agent and agree to pay him a compensation, for she may do through him whatever she may do through another with his consent; but should she refuse payment he cannot enforce it. It is his legal, as well as moral, duty to represent her. He may employ her as his agent, and her acts in his behalf will bind him, yet she cannot compel him to compensate her, for it is not such a contract as she can make in law.

The common law gives no sanction to postnuptial contracts. Equity will sometimes enforce them, but to meet its sanction

¹⁵Stewart, *Hus. & Wife*, § 39.

¹⁶Cartwright v. Hollis, 5 Tex. 152.

¹⁷Pearce v. Jackson, 61 Tex. 642.

¹⁸*Ante*, chap. III.

and approbation, they must stand upon the broad principles of equity, and appeal strongly to the conscience of the court for sanction.¹⁹ A postnuptial contract whereby the wife, in consideration of setting apart to her one sixth of the community property for her separate maintenance during her natural life, relinquished all her right to claim any of the other property of her husband reserved to himself, and all other community property to which she might be entitled under the law, has been held to be void, and not of the class which appeals to the conscience of a court for sanction.²⁰ Likewise where the husband and wife entered into an agreement by the terms of which, "in case he died without issue of his marriage, his property was to descend and be distributed among his heirs, as if no marriage had ever taken place between him and his wife," thus depriving her of his personal property, and one half of the real estate, to which she would be entitled under the laws of this state, and also revoking a prior antenuptial agreement, the court, when called upon, said: "We think the court below . . . should have instructed the jury to find for the plaintiff [wife] on the ground that the agreement sought to be set aside was such an agreement as the husband and wife had no power to make. The agreement was intended to change the law of descent, and, at the death of the husband, deprive the wife of her distributive share of his property under the law. Husband and wife cannot alter the legal order of descent, in respect to themselves or their children, by contract made in contemplation of marriage, and by a much stronger reason, they cannot do so by contract during marriage."²¹

Marriage in no manner discharges the antenuptial mutual obligations or contracts of the parties, as was the case at common law.

§ 50. Can Bind Her Husband, When.

The husband is not bound by the contract of his wife entered

¹⁹Ximines v. Smith, 39 Tex. 49; Pearce v. Jackson, 61 Tex. 646, 647.

²⁰Proetzel v. Schroeder, 83 Tex. 684, 19 S. W. 292.

²¹Groesbeck v. Groesbeck, 78 Tex.

664, 14 S. W. 792, citing Rev. Stat. art. 2963; Cox v. Miller, 54 Tex. 16; Winn v. Winn (Tex. Civ. App.) 57 S. W. 80; *post*, § 278; *post*, chap. XVII.

into before marriage,²² nor is he liable for services rendered at her instance after divorce, although such services may be for the benefit of the community estate, unless he authorized, or in some way ratified, her act.²³ There is nothing in our laws which incapacitates the wife from acting as agent for her husband; and whatever agreements she may make, or contracts she may enter into, whether in his name or her own, if the same be authorized or subsequently ratified by him, will, of course, bind him.²⁴ And her agency for him may be shown by circumstances; for in the nature of things, it is but natural that he should authorize her impliedly, if not expressly, to make numerous contracts, of purchase and otherwise, concerning the domestic affairs of the family. By permitting her to make these contracts, by paying her bills, and by numerous other ways, he may authorize her to bind him in this respect. Where he permits her to make purchases for the family, and the goods are used with his knowledge, and he makes no repudiation of her contract, he will be held to have acquiesced in it and be bound for it, whether the purchase be of necessities or not.²⁵ But his liability is upon the identical contract of purchase made by her, which he is deemed to have made his own, and not upon her subsequent unauthorized contract giving a lien upon the property or extending the time of payment.²⁶

The wife may also, during the protracted absence of the husband, make certain contracts which will be binding upon him; as where she may cause work and labor to be done upon the homestead, the same being necessary to the profitable cultivation and use of the land;²⁷ or make a lease of a dwelling house to prevent being ousted. And in the latter case her act, being

²²Nash v. George, 6 Tex. 234;
Roundtree v. Thomas, 32 Tex. 286;
Siese v. Malsch, 54 Tex. 355.

²³Bohannon v. Pearson, 2 Tex.
App. Civ. Cas. (Willson) § 622.

²⁴Matlock v. Glover, 63 Tex. 231;
Billington v. Hammond, 3 Tex. App.
Civ. Cas. (Willson) § 295.

²⁵Walling v. Hannig, 73 Tex. 580,
11 S. W. 547.

²⁶Hamilton v. Peck (Tex. Civ.
App.) 38 S. W. 403; *post*, § 67.

²⁷McAfee v. Robertson, 41 Tex.
355.

thus authorized, will have the effect of recognizing title to such property in the lessor, upon a subsequent proceeding.²⁸

§ 51. — for Necessaries for Herself and Children.

So, also, may she bind him for such articles as are commonly known as “necessaries” for herself and children. The law imposes upon the husband the duty of providing for his family, and should he fail to do this, the wife has an implied authority to purchase upon his credit. The articles that she may purchase, and for which he will be bound, are such as are suited to her situation or station, and the means of her husband and his condition in life.²⁹ The husband’s liability does not rest wholly upon his wife’s implied authority to purchase, and consequent permission to bind him, but upon a broader and far more sensible principle of our law, which is, that by contracting the relation of marriage he takes upon himself the duty of supplying his wife with necessaries; and if he does not perform that duty, either through his own fault or in consequence of misfortune, the wife has, in consequence of that relation, a right to provide herself with them, and he is liable for payment. He holds himself out to the world, by reason of his marital relation, as promising to supply these things to his wife, and therefore to pay for them whether they be purchased by himself or by his wife upon his failure to supply them. And he is thus liable notwithstanding the necessaries are furnished contrary to his instruction. For it is not alone upon the principle of authority conferred upon her by him that she supplies such things. He cannot avoid his liability to properly support her, even if he desires to do so. Such things may be furnished, and the husband looked to for payment. For “the law will not presume so much ill as that a husband should not provide for his wife’s necessities. Yet, this being proved, the law will not do so much ill as to leave her without necessaries.”³⁰ That he has abandoned her does not relieve him.³¹

It has been said that the husband is not liable for necessaries

²⁸Golden v. Galveston, 20 Tex. Civ. App. 584, 50 S. W. 416.

²⁹Post, § 54.

³⁰Black v. Bryan, 18 Tex. 453.

³¹Palmer v. Coghlan (Tex. Civ. App.) 55 S. W. 1122.

furnished his wife by her parents unless there is an express understanding to that effect.³² While in such a case the presumption of gift might be a reasonable one, yet such presumption being overcome by evidence, no reason is apparent why the husband should not be liable, even without a promise of payment.

§ 52. — the Rule Stated by Parsons.

“The courts now show a tendency to rest the responsibility of the husband for necessities supplied to the wife, on the duty which grows out of the marital relation. He is the husband; he is the stronger, she the weaker; all that she has is his; the act of marriage destroys her capacity to pay for a loaf with her own money; and all she then possesses, and all she may afterwards acquire, are his during life and marriage; upon him must rest with equal fullness, if the law would not be the absolute opposite of justice, the duty of maintaining her and supplying all her wants, according to his ability. And we think this plain rule of common sense and common morality is becoming a rule of the common law.”³³

§ 53. — by Chief Justice Hemphill.

“That this is the true ground of the husband’s liability for necessities for the wife, *viz.*, his duty arising from the marriage relation itself, to supply her with necessities, cannot admit of question. It is comprehensive, embracing all cases where articles of necessity have been furnished. It requires no legal fiction for its support. It is consistent with fact, and it is founded to some extent on the great fact that all she possesses, her time, labor, and money, belong to the husband; and if at common law the true principle of the liability of the husband arises from his duty under the marriage relation by which he is vested with the property of the wife, so much the more strongly is it his duty under the marital relations in this state by which he is not vested with the property of the wife, but has the management and control of that property and its proceeds,

³²Kelly, Contr. Mar. Wom. 171,
172.

³³1 Pars. Contr. 290, 291.

her condition and estate,—are necessities.³⁸ Where husband and wife are living apart, a horse purchased by her for use in a business of her own is not a necessary.³⁹

§ 55. When Credit Extended to the Wife.

That the credit was extended to the wife, and not to the husband, will not relieve him from liability. Its only effect would be a possible charging of the wife according to the facts, not a release of him. But, where, as under our system, the control of the wife's separate estate, all of its fruits and revenues, and all of her time and labor, belong to the husband, it is idle to speak of a dealer's extending credit to the wife, and looking alone to her for payment. It could only be under the most extraordinary circumstances that a purchase by her would not be binding upon him.⁴⁰

§ 56. Can Bind Herself for Necessaries.

It is not only true that the wife may bind her husband for necessities for herself and children, but for such things she may bind herself as well.⁴¹ She may contract debts for necessities furnished herself or children, and for all expenses which may be incurred for the benefit of her separate property,⁴² and she herself will be the judge of what articles are necessary for herself and children, subject to the condition that it must appear to the satisfaction of the court and jury that they were reasonable and proper.⁴³ And whether they are reasonable and proper will again be a question to be determined from all the surrounding circumstances.

§ 57. But Debt should be Contracted Personally.

In order to hold the wife liable for necessities furnished her-

³⁸Stewart, *Hus. & Wife*, § 95; *post*, §§ 58, 66.

³⁹Palmer v. Coghlan (Tex. Civ. App.) 55 S. W. 1122.

⁴⁰Black v. Bryan, 18 Tex. 453.

⁴¹Hollis v. Francois, 5 Tex. 195; Milburn v. Walker, 11 Tex. 329;

Booth v. Cotton, 13 Tex. 359; Magee v. White, 23 Tex. 180.

⁴²Rev. Stat. art. 2970; Eager v. Morris, 1 Tex. App. Civ. Cas. (White & W.) § 177.

⁴³Rev. Stat. art. 2971; Milburn v. Walker, 11 Tex. 329; Walling v. Hannig, 73 Tex. 580, 11 S. W. 547.

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34. Information in Husband

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... App. 14, 25 S. W. ... Tax App ... Tax ... Special Tax ... Tax 123 ... Tax 146, M. F. ... Tax 374.

are supplanted by the rule announced in the later case of *Ma-gee v. White*, 23 Tex. 180, which is more in consonance with the spirit of our system. The rules applied by courts of chancery in England, to estates limited to the sole and separate use of married women, are not applicable to the wife's statutory separate estate in this state.⁴⁷

§ 59. Her Estate Liable, When.

To be sure, when the wife is personally bound, her estate is liable, save where it is by law exempt from forced sale. It was the intention of our lawmakers to preserve, as far as possible, the *corpus* of the wife's separate property from the encroachments of the husband. The law imposes upon him the duty to support his wife and children, and, the better to aid him in doing this, places at his disposal the use, fruits, and revenues of her property, from which, along with the other community property and his own, he may secure the means of doing so. But he cannot even for this purpose encumber her property. This would admit his right to dispose entirely of it, for the right to charge will amount to a right to dispose.⁴⁸ It is liable only for her own debts contracted in the manner and for the purposes pointed out by law, or for her individual torts, and antenuptial debts.

The cases preceding *Stansbury v. Nichols*, 30 Tex. 145, holding that, independently of the contracts specifically mentioned in the statute, her estate might be equitably charged with necessities for the family where the husband owned no estate, was insolvent, etc., have been repudiated, and the tendency since the case cited has been to limit the liability of her estate to her individual debts contracted or incurred in strict accordance with law. This is the better rule, for to admit the husband's right to charge her estate upon any pretext would be to tamper with a right which the law deems inviolable,—her right to own an estate.

⁴⁷*Haynes v. Stovall*, 23 Tex. 625; 145; *Harris v. Williams*, 44 Tex. 124.
Hutchinson v. Underwood, 27 Tex. 124.
255; *Stansbury v. Nichols*, 30 Tex. ⁴⁸*Ante*, § 37.

§ 66. Concerning Her Separate Estate.

The wife's power to incur expenses for the benefit of her separate property is recognized by statute.⁴⁹ Since the law has undertaken to define the purposes and methods by which a wife may charge herself or property, one of these methods must be strictly pursued before she or her property is bound.⁵⁰ A contract entered into by the husband and wife jointly for the purpose of procuring the erection of a house upon the separate property of the wife, the house to be used for the exclusive benefit and improvement of her separate property, will bind her, and her estate is liable for its payment.⁵¹ And where the husband, with the wife's knowledge, caused the title to her property to be made to her father-in-law as trustee, but retained the management of the estate, and contracted debts in the name of the trustee, her estate was held liable for such a debt contracted for brick and other material furnished in improving her property.⁵² And here, as in cases where it is sought to bind the wife for necessities, before she and her estate are liable it must appear that the contract concerning the same was either contracted by her personally, by her authority, or under her direction.⁵³

What expenses are for the benefit of her property must be left to the good judgment of the court or jury, as any other question of fact. Buildings, repairs, insurance, and betterments for her realty, food and shelter for her stock, personal labor when required to preserve her property, whether real or personal, may be mentioned. It should be a contract for expenses incurred concerning separate property then owned by her, according to the writer's construction of the act. In *George v. Sterens*, 31 Tex. 670, it was held that the wife's note, the husband assenting

⁴⁹Rev. Stat. art. 2970, and art. 1201.

⁵⁰*Magee v. White*, 23 Tex. 180; *Trimble v. Miller*, 24 Tex. 214; *Covington v. Burleson*, 25 Tex. 368; *Menard v. Sydnor*, 29 Tex. 257; *Lynch v. Elkes*, 21 Tex. 229; *Haynes v. Stovall*, 23 Tex. 625; *Cheek v. Bellows*, 17 Tex. 613; *Fullerton v.*

Doyle, 18 Tex. 3; *Stansbury v. Nichols*, 30 Tex. 145; *Forbes v. Moore*, 32 Tex. 195.

⁵¹*Butler v. Robertson*, 11 Tex. 142; *Smotridge v. Lovell*, 35 Tex. 58.

⁵²*Perkins v. Baker*, 38 Tex. 45.

⁵³*Harris v. Williams*, 44 Tex. 124; *Eager v. Morris*, 1 Tex. App. Civ. Cas. (White & W.) § 177.

by joining, was enforceable against her where given for the purchase of a negro to belong separately to her, upon the apparent reasoning that it was a contract for the benefit of her separate property. Is this good logic? Can a contract to purchase property be a debt contracted for the expenses incurred for the benefit of such property? If it were so, the wife could bind herself for all purchasers made by her, no matter whether she owned a separate estate or not, and such contracts would be for the benefit of her separate property.⁵⁴

Expenses incurred by the husband in quarrying rock from land, the separate property of the wife, are not "expenses incurred for the benefit" of such property.⁵⁵

§ 61. — whether Husband Liable upon Such Contracts.

If the husband and wife join in a contract for expenses incurred for the benefit of her separate property, there can be no question of his liability.⁵⁶ It is contractual. But even where he does not join, if it be such a contract as she is authorized to make, it seems that he is also liable, and the statute says he may be sued therefor.⁵⁷ Witness: The article last cited which provides that he shall be jointly sued for such debt, and not merely *pro forma*, for he is not therein exempted from a personal judgment as in the article succeeding it.⁵⁸ But it may be contended that article 2971 of the statutes indicates a different intention. The article reads: "Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted" (for necessities), "or expenses so incurred" (for benefit of her separate property), "were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff." But when it is remembered that this article is part of the chapter defining specially the rights and liabilities of married women, and not of married men, it can be understood that its purpose was specially to fix the liability of a married

⁵⁴See *post*, 70.

⁵⁵Eager v. Morris, 1 Tex. App. Civ. Cas. (White & W.) § 178.

⁵⁶Smotridge v. Lovell, 35 Tex. 58.

⁵⁷Rev. Stat. arts. 2970, 1201.

⁵⁸Ibid. 1202.

woman for the character of debts mentioned, and not to absolve the husband from liability if he were otherwise liable: in other words, to provide that her separate property, as well as the community, was liable for her authorized contracts. If the article by directing execution against the separate property of the wife or the community, and omitting to recognize the liability of the husband's property, has the effect of absolving him from liability for her contracts for the benefit of her separate property, it has the same effect concerning her debts contracted for necessities for herself and children, for the two classes of contracts are included in the article, and also in the one preceding it to which reference is specially made: but we know that he is bound for these necessities, and may be sued for them "in the manner prescribed in article 1201." Now the article either excludes the idea of his liability in both instances, or it has no reference thereto, in either. While this rule may apparently be a hardship on the husband, it is largely ameliorated by the fact that he receives the use, rents, profits, and occupation of her property during marriage, and should therefore be liable for its necessary expense. It would not be equitable to give him these things, and in addition thereto to require the wife from the *corpus* of her property to bear the necessary expense of preserving it. The provision that such debts must appear to the satisfaction of the court to have been reasonable and proper affords a sufficient safeguard against any possible injustice to him in charging him with that class of betterments, and permanent improvements that go to materially enhance the value of the *corpus* of the wife's property, and limit it to the reasonable and proper expense in maintaining and preserving her property. This expense he ought to bear.

§ 62. May Transfer Her Notes.

Notes made payable to the wife or to her order, during marriage, are presumptively community property;⁵⁹ but whether they are or not, they are by law under the control of the husband, and the wife has no right to alienate them except in the manner provided by law.⁶⁰ But she may if the husband consents

⁵⁹Wells v. Cockrum, 13 Tex. 127.

⁶⁰Ante, § 30.

transfer by indorsement notes made payable to her order,⁶¹ or where such facts exist as authorize her to act as a *feme sole*. And her mere indorsement with her husband's consent carries her title, even though the note be secured by a lien upon land. No privy examination and acknowledgment are necessary.⁶²

§ 63. May Release Her Cause of Action.

So, she may, in a proper case, execute a valid release of a cause of action, as, for instance, accept a stipulated sum as her portion as heir of an estate, agreeing, in consideration therefor, to relinquish all other right which she might have to such estate, and such release would be valid. It need not be in writing and acknowledged privily even though it embrace land, since the statute relates only to a "deed or other writing purporting to be a conveyance."⁶³

§ 64. May Make Partition Deeds.

Another class of contracts of very considerable importance in matters of land titles in this state, into which married women may enter, is contracts of partition. Such a contract cannot properly be said to be a conveyance of land within the meaning of our registration and acknowledgment laws, and hence does not have to be in writing nor acknowledged in the manner required in the conveyance of land.⁶⁴ The contract may be one of parol. It is sufficient to bind the wife if it be entered into by her with the consent of her husband, and she receive a consideration therefor. Tenants in common hold an interest in the entire land to which their cotenancy extends, but neither owns any particular portion of it to the exclusion of his cotenants; and to apportion the land thus held in common, so as to give to each the exclusive ownership of a designated portion in severalty, is for each to surrender his interest in the portion allotted to others. But this release of interest is considered by our courts

⁶¹Hemmingway v. Mathews, 10 Tex. 207.

⁶²McCamly v. Waterhouse, 80 Tex. 340, 16 S. W. 19.

⁶³French v. Strumberg, 52 Tex. 92; Robbins v. Island City Sav. Bank, 3 M. W.—5.

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§ 65. Concerning Boundary Lines of Her Property.

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Such is the relation of husband and wife that she is often called upon to act as his impliedly authorized agent.⁷² There can be no question of her right to act for him when she is expressly authorized. It frequently happens that, on account of the husband's abandonment or other absence, the wife is compelled to act with reference to property over which the husband when present has sole control and management, and in respect to matters that are ordinarily within his special province when fulfilling the duties as head of the family. Under such circumstances her authority to represent him will be implied; for then she is necessarily compelled to assume the position of the husband, to discharge his duties, and incur his responsibilities, and her powers should correspond with the new duties she is thus compelled to assume.⁷³ It would seem, since the law invests the husband with the sole control and management of all property during coverture, that the wife's right to control under the foregoing circumstances would be by reason of an implied agency growing out of the necessities of the case.⁷⁴ The law conclusively presumes that she is his agent when this necessity arises. But she would not be permitted to go beyond the exigencies of her situation, but to this extent her acts are binding

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by a paper sold and used in redemption by the husband.⁷⁵ But it is to be remembered that the wife is not necessarily the agent of the husband when there exists no urgent necessity for his having a representative. It is a question of fact to be shown by the party asserting such agency. In many cases, from the nature of the transaction and position of the parties, slight proof will establish the agency; in others strict proof ought to be required. Where husband and wife are living together the implication of her authority to act for him in the household and family affairs is much stronger than where they are living apart. If living apart he is bound only for such things as necessities, and he is bound only so long as they are supplied. If in the same house he will contract he is bound as before stated for such things as he permits her to bring there and retain knowing they are purchased on credit. But not being his agent in law, payment to her of his debt for him is no discharge, nor is her receipt. She cannot take his money from bank, or sell his goods.⁷⁶ If he puts her in charge of the household affairs her authority extends to making all such contracts as are reasonably proper and necessary in the premises. She may deal with the furniture, the fixtures, the grounds, and he is bound, no matter whether the same be necessary in the sense of their being needed or not.⁷⁷

§ 68. Her Warranty.

It would be an almost needless repetition to say here that the wife cannot contract a pecuniary liability except it be for the benefit of her separate property, or for necessities for herself or children. Her contracts of warranty are no exception to this long-established and well-recognized rule.⁷⁸ And, of course, not being liable upon her warranty of her own property, she will not be upon a warranty with her husband of property not her

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§ 69. For Acquisition of Land.

The wife may make purchases of land if she chooses, or she may contract to buy it if she likes. Where she pays only a part of the purchase money, if it appears that she intended to meet the deferred payments out of funds arising from her separate estate, the land will be hers, and not liable for the husband's debts.⁸¹ The fact that the husband joins the wife in signing the notes for the unpaid purchase money does not alter the rule.⁸² Or if she borrow the money with which to discharge the note it would still make no difference.⁸³ The contract to buy may be either from an individual or the state. It was held in *Barnett v. Murray*, 54 S. W. Rep. 784, that a wife's settlement upon, and purchase of, land from the state, her husband assenting thereto, was valid; and again, in *Lee v. Green*, 58 S. W. Rep. 847, that a married woman might become the purchaser of state school land by mesne conveyances from the original purchaser, her failure to file with the commissioner of the general land office her individual obligation therefor, as in such case the purchaser may do under the statute, not working a forfeiture of her title. The assent of the husband in such cases could not be material to her contract of purchase, except as it might affect her ability to comply with the statutory requirements as to settlement, etc., since his assent cannot confer capacity at all. Being competent, then, in a qualified sense to purchase land, or other property as to that, on credit, we come to consider—

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The wife is liable for purchase money only when the articles

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self or children, the debt should be contracted by her personally, or by someone acting under her authority. Such seems to be the intention of our statute, and has been the annunciation of our courts.⁴⁴ By this is meant that she should do or say something that clearly indicates an intention upon her part to be bound for their payment, and cause the seller to look to her for such. It is not sufficient that she merely give the order for the goods, as for groceries for the family, for in such a case the presumption is that she does so as the agent of the husband, whose duty it is to supply such things.⁴⁵ It cannot be supposed that because she accepts and uses articles purchased by her husband knowing them to be not paid for, she thereby agrees to pay, for she is entitled to presume that her husband has purchased them upon his own credit, and to consider the purchase his, and not hers at all. If the authority of another be relied upon to thus bind her, the facts conferring such authority should be very plain and positive.

§ 58. **Necessaries for Husband.**

If the husband were permitted to encumber his wife's separate property for necessaries for himself, it would change the whole policy of our marital laws with reference to the wife's estate, and make it possible for him to completely deprive her of all her property, while none of the benefits would flow to her. Her property is committed to his care that he may occupy and use it, but not that he may convert or destroy it. Necessaries for the husband are not a legitimate charge against her property. It is not one of the purposes for which she may herself charge it, by simple contract. The law nowhere requires the wife to support the husband, even though he be insolvent. If the language of the earlier decisions⁴⁶ intimates such a doctrine, they

⁴⁴Christmas v. Smith, 10 Tex. 123; Milburn v. Walker, 11 Tex. 329; Bailey v. Hicks, 16 Tex. 222; Brown v. Ector, 19 Tex. 346; McFaddin v. Crumpler, 20 Tex. 374; Magee v. White, 23 Tex. 180; Haynes v. Stovall, 23 Tex. 625; Hutchinson v. Underwood, 27 Tex. 255; Stansbury v. Nichols, 30 Tex. 145; Ruiz v. Camp-

bell, 6 Tex. Civ. App. 714, 26 S. W. 295; Eager v. Morris, 1 Tex. App. Civ. Cas. (White & W.) § 177.

⁴⁵Menard v. Schneider (Tex. Civ. App.) 48 S. W. 761.

⁴⁶Christmas v. Smith, 10 Tex. 123; Brown v. Ector, 19 Tex. 346; McFaddin v. Crumpler, 20 Tex. 374.

are supplanted by the rule announced in the later case of *Ma-gee v. White*, 23 Tex. 180, which is more in consonance with the spirit of our system. The rules applied by courts of chancery in England, to estates limited to the sole and separate use of married women, are not applicable to the wife's statutory separate estate in this state.⁴⁷

§ 59. Her Estate Liable, When.

To be sure, when the wife is personally bound, her estate is liable, save where it is by law exempt from forced sale. It was the intention of our lawmakers to preserve, as far as possible, the *corpus* of the wife's separate property from the encroachments of the husband. The law imposes upon him the duty to support his wife and children, and, the better to aid him in doing this, places at his disposal the use, fruits, and revenues of her property, from which, along with the other community property and his own, he may secure the means of doing so. But he cannot even for this purpose encumber her property. This would admit his right to dispose entirely of it, for the right to charge will amount to a right to dispose.⁴⁸ It is liable only for her own debts contracted in the manner and for the purposes pointed out by law, or for her individual torts, and antenuptial debts.

The cases preceding *Stansbury v. Nichols*, 30 Tex. 145, holding that, independently of the contracts specifically mentioned in the statute, her estate might be equitably charged with necessities for the family where the husband owned no estate, was insolvent, etc., have been repudiated, and the tendency since the case cited has been to limit the liability of her estate to her individual debts contracted or incurred in strict accordance with law. This is the better rule, for to admit the husband's right to charge her estate upon any pretext would be to tamper with a right which the law deems inviolable,—her right to own an estate.

⁴⁷*Haynes v. Stovall*, 23 Tex. 625; 145; *Harris v. Williams*, 44 Tex. 124.
Hutchinson v. Underwood, 27 Tex. 255; *Stansbury v. Nichols*, 30 Tex. 145.
⁴⁸*Ante*, § 37.

§ 60. Concerning Her Separate Estate.

The wife's power to incur expenses for the benefit of her separate property is recognized by statute.⁴⁹ Since the law has undertaken to define the purposes and methods by which a wife may charge herself or property, one of these methods must be strictly pursued before she or her property is bound.⁵⁰ A contract entered into by the husband and wife jointly for the purpose of procuring the erection of a house upon the separate property of the wife, the house to be used for the exclusive benefit and improvement of her separate property, will bind her, and her estate is liable for its payment.⁵¹ And where the husband, with the wife's knowledge, caused the title to her property to be made to her father-in-law as trustee, but retained the management of the estate, and contracted debts in the name of the trustee, her estate was held liable for such a debt contracted for brick and other material furnished in improving her property.⁵² And here, as in cases where it is sought to bind the wife for necessities, before she and her estate are liable it must appear that the contract concerning the same was either contracted by her personally, by her authority, or under her direction.⁵³

What expenses are for the benefit of her property must be left to the good judgment of the court or jury, as any other question of fact. Buildings, repairs, insurance, and betterments for her realty, food and shelter for her stock, personal labor when required to preserve her property, whether real or personal, may be mentioned. It should be a contract for expenses incurred concerning separate property then owned by her, according to the writer's construction of the act. In *George v. Stevens*, 31 Tex. 670, it was held that the wife's note, the husband assenting

⁴⁹Rev. Stat. art. 2970, and art. 1201.

⁵⁰*Magee v. White*, 23 Tex. 180; *Trimble v. Miller*, 24 Tex. 214; *Covington v. Burleson*, 28 Tex. 368; *Menard v. Sydnor*, 29 Tex. 257; *Lynch v. Elkes*, 21 Tex. 229; *Haynes v. Stovall*, 23 Tex. 625; *Cheek v. Bellows*, 17 Tex. 613; *Fullerton v.*

Doyle, 18 Tex. 3; *Stansbury v. Nichols*, 30 Tex. 145; *Forbes v. Moore*, 32 Tex. 195.

⁵¹*Butler v. Robertson*, 11 Tex. 142; *Smotridge v. Lovell*, 35 Tex. 58.

⁵²*Perkins v. Baker*, 38 Tex. 45.

⁵³*Harris v. Williams*, 44 Tex. 124; *Eager v. Morris*, 1 Tex. App. Civ. Cas. (White & W.) § 177.

by joining, was enforceable against her where given for the purchase of a negro to belong separately to her, upon the apparent reasoning that it was a contract for the benefit of her separate property. Is this good logic? Can a contract to purchase property be a debt contracted for the expenses incurred for the benefit of such property? If it were so, the wife could bind herself for all purchasers made by her, no matter whether she owned a separate estate or not, and such contracts would be for the benefit of her separate property.⁵⁴

Expenses incurred by the husband in quarrying rock from land, the separate property of the wife, are not "expenses incurred for the benefit" of such property.⁵⁵

§ 61. — whether Husband Liable upon Such Contracts.

If the husband and wife join in a contract for expenses incurred for the benefit of her separate property, there can be no question of his liability.⁵⁶ It is contractual. But even where he does not join, if it be such a contract as she is authorized to make, it seems that he is also liable, and the statute says he may be sued therefor.⁵⁷ Witness: The article last cited which provides that he shall be jointly sued for such debt, and not merely *pro forma*, for he is not therein exempted from a personal judgment as in the article succeeding it.⁵⁸ But it may be contended that article 2971 of the statutes indicates a different intention. The article reads: "Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted" (for necessities), "or expenses so incurred" (for benefit of her separate property), "were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff." But when it is remembered that this article is part of the chapter defining specially the rights and liabilities of married women, and not of married men, it can be understood that its purpose was specially to fix the liability of a married

⁵⁴See *post*, 70.

⁵⁵Eager v. Morris, 1 Tex. App. Civ. Cas. (White & W.) § 178.

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woman for the character of debts mentioned, and not to absolve the husband from liability if he were otherwise liable; in other words, to provide that her separate property, as well as the community, was liable for her authorized contracts. If the article by directing execution against the separate property of the wife or the community, and omitting to recognize the liability of the husband's property, has the effect of absolving him from liability for her contracts for the benefit of her separate property, it has the same effect concerning her debts contracted for necessities for herself and children, for the two classes of contracts are included in the article, and also in the one preceding it to which reference is specially made; but we know that he is bound for these necessities, and may be sued for them "in the manner prescribed in article 1201." Now the article either excludes the idea of his liability in both instances, or it has no reference thereto, in either. While this rule may apparently be a hardship on the husband, it is largely ameliorated by the fact that he receives the use, rents, profits, and occupation of her property during marriage, and should therefore be liable for its necessary expense. It would not be equitable to give him these things, and in addition thereto to require the wife from the *corpus* of her property to bear the necessary expense of preserving it. The provision that such debts must appear to the satisfaction of the court to have been reasonable and proper affords a sufficient safeguard against any possible injustice to him in charging him with that class of betterments, and permanent improvements that go to materially enhance the value of the *corpus* of the wife's property, and limit it to the reasonable and proper expense in maintaining and preserving her property. This expense he ought to bear.

§ 62. May Transfer Her Notes.

Notes made payable to the wife or to her order, during marriage, are presumptively community property;⁵⁹ but whether they are or not, they are by law under the control of the husband, and the wife has no right to alienate them except in the manner provided by law.⁶⁰ But she may if the husband consents

⁵⁹Wells v. Cockrum, 13 Tex. 127.

⁶⁰Ante, § 39.

transfer by indorsement notes made payable to her order,⁶¹ or where such facts exist as authorize her to act as a *feme sole*. And her mere indorsement with her husband's consent carries her title, even though the note be secured by a lien upon land. No privy examination and acknowledgment are necessary.⁶²

§ 63. May Release Her Cause of Action.

So, she may, in a proper case, execute a valid release of a cause of action, as, for instance, accept a stipulated sum as her portion as heir of an estate, agreeing, in consideration therefor, to relinquish all other right which she might have to such estate, and such release would be valid. It need not be in writing and acknowledged privily even though it embrace land, since the statute relates only to a "deed or other writing purporting to be a conveyance."⁶³

§ 64. May Make Partition Deeds.

Another class of contracts of very considerable importance in matters of land titles in this state, into which married women may enter, is contracts of partition. Such a contract cannot properly be said to be a conveyance of land within the meaning of our registration and acknowledgment laws, and hence does not have to be in writing nor acknowledged in the manner required in the conveyance of land.⁶⁴ The contract may be one of parol. It is sufficient to bind the wife if it be entered into by her with the consent of her husband, and she receive a consideration therefor. Tenants in common hold an interest in the entire land to which their cotenancy extends, but neither owns any particular portion of it to the exclusion of his cotenants; and to apportion the land thus held in common, so as to give to each the exclusive ownership of a designated portion in severalty, is for each to surrender his interest in the portion allotted to others. But this release of interest is considered by our courts

⁶¹Hemmingway v. Mathews, 10 Tex. 207.

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⁸²*Ullmann v. Jasper*, 70 Tex. 446, 7 S. W. 763.

⁸³*Schuster v. L. Bauman Jewelry Co.* 79 Tex. 179, 15 S. W. 259.

purchased were necessities or for the benefit of her separate property. It has never been thought that she has the right to buy indiscriminately what she pleases, and bind herself or her husband. She was held not liable upon a note signed jointly with her husband for the hire of a slave, no other fact appearing to indicate that the contract was one she could make.⁸⁴ Her contract liability for unpaid purchase money for land is governed by precisely this principle. While under our peculiar system of land laws the superior title to land sold is said to remain with the vendor until the final payment of the purchase money, lands purchased by her on credit remain liable at all times to be subjected to the payment of this purchase money; she is not personally liable. The land only can be recovered, and nothing further.⁸⁵ The law will not permit the whole of her estate to be jeopardized, probably sacrificed, in her attempt to make additional purchases. She merely holds the land subject to the vendor's lien, but is in no way responsible for the purchase money, even if the deed be made to her and she sign the purchase-money notes, for the vice of the transaction is in her want of capacity to make the contract in any form.⁸⁶

§ 71. Her Right to Rescind; Recovery Back.

Where a contract of a married woman is such a one as cannot be enforced against her she may at any time she may choose abandon it, but so long as she elects to stand by it, the other party is bound. Where part payment has been made by a married woman upon such unenforceable contract, her lack of power upon a rescission to recover it back is clearly illustrated by the very lucid opinion of Justice Brown, in *Pitts v. Elsler*, 87 Tex. 347, 28 S. W. 518, in the following language: "A married woman cannot, solely on account of her coverture, recover the payment made. . . . A married woman who voluntarily pays her money or other personal property upon a contract made by her, or in any way that would bind a man, cannot recover it back, simply upon the ground that she is a married woman. . . ."

⁸⁴Trimble v. Miller, 24 Tex. 214.

⁸⁵Lynch v. Elkes, 21 Tex. 229;
Noel v. Clark (Tex. Civ. App.) 60 S.
W. 356.

⁸⁶Farr v. Wright, 27 Tex. 96;
Covington v. Burleson, 28 Tex. 368;
Smith v. Wilson (Tex. Civ. App.) 32
S. W. 434.

In this state the right of a married woman to acquire and hold property, real and personal, either by gift, devise, descent, or purchase, is as absolute as that of her husband. She may with his consent mortgage her real estate to secure his debts, or she might give her personal property to him or to any other person. If she contract to buy on credit, and execute a note for the price, she may or may not, as she may elect, proceed with the contract, and the person contracting with her cannot refuse to carry out the agreement because she is a married woman. If she elect to abandon the contract, she cannot be compelled to pay what she has promised, but she must return what she has received. Mrs. Pitts had the right to refuse to receive the property, and could not be compelled to complete the unexecuted part of the contract; but when she elected to abandon the trade she must determine for herself, as if she were a man, whether it was to her advantage to refuse to proceed, and, having so decided, she has only such remedies as a man would have under the same state of case. It would be a novel case for a plaintiff to allege that the defendant had done no wrong in the transaction, but that, because she was not bound to carry out her agreement, she was entitled to relief against her own deliberate act, which was lawful in itself, or, if unlawful, would not put the defendant in the wrong. If she is damaged by the result, she had it in her power to have protected herself by paying the remainder of the price and taking the goods, and if the property purchased was not, in her opinion, of sufficient value to justify this, she had the advantage over a man, of abandoning the contract and escaping responsibility for other damages than the sum advanced."⁸⁷

§ 72. — Returning Benefits.

The wife may, or may not, be required to return the benefits received to entitle her to a rescission. In the matter of recovering her lands conveyed in a manner not binding upon her, and where the purchaser knows or must be held to know the vice of the conveyance, she is entitled to an unconditional recovery. For such a transaction cannot be ratified by accepting the pur-

⁸⁷See *Pitt v. Elser*, 7 Tex. Civ. App. 47, 32 S. W. 146.

chase money, nor an estoppel created against her. To so say would emasculate the statute requiring her conveyances to be in a particular form and in a particular manner.⁸⁸ But where the purchaser is entirely without fault, and not chargeable in law with the knowledge of the defects of her conveyance or grounds authorizing a recovery, equity might require her to restore such purchaser his consideration paid her.⁸⁹ And in the case of such contracts as she may by ratification affirm, it would not be at all proper to permit her to recover her property without a due return of the consideration received,⁹⁰ even if she should be permitted to do so then; for it is difficult to see upon what principle she is entitled to a rescission at all when she has in law ratified the disposition of her property, which she has surely done when she refuses to return the consideration paid. At any rate, if the transaction be not in violation of any rule of law, she must return the benefits received before she is in a position to ask relief from her contract.

§ 73. Her Contracts of Insurance.

A married woman's contracts of insurance for the protection of her separate property would be upheld as valid, the same as any other contract which she might make for its benefit. For at this day it has come to be considered a business necessity to thus protect one's property against loss by fire. But while the husband may bind himself for such purposes, he would have no authority to bind her without her permission. Whether an insurance upon her life is a necessary would depend upon the circumstances,—the station in life occupied by the parties, as well as their ability. She may contract for a policy upon her life for his benefit as his agent; in which case her representations will be binding upon him.⁹¹

⁸⁸Berry v. Denley, 26 Tex. 737; Moores v. Linney, 2 Tex. Civ. App. 293, 21 S. W. 709; Owen v. New York & T. Land Co. 11 Tex. Civ. App. 284, 32 S. W. 1057; Grandjean v. San Antonio (Tex. Civ. App.) 38 S. W. 837; De Garcia v. Lozano

(Tex. Civ. App.) 54 S. W. 280.

⁸⁹Pearson v. Cox, 71 Tex. 246, 9 S. W. 124.

⁹⁰Woodward v. McNeill, 75 Tex. 146, 13 S. W. 222.

⁹¹Centennial Mut. L. Asso. v. Parham, 80 Tex. 518, 16 S. W. 316.

§ 74. For Sale of Land.

Of course no oral contract for the sale of land can be enforced in this state; the statute of frauds inhibits actions upon such contracts. Nor can the written contract of a married woman be enforced in a court of equity, unless the contract be in full compliance with the statute in respect to conveyances of married women's estates. The courts can indeed do no more than the married woman herself can do in the conveying of her property; it is not within her power to divest herself of title to land except in the manner provided by law; much less can a court do such a thing. But if a married woman executes a bond for title or other executory contract in writing to convey, and she is joined by her husband, and the instrument is properly acknowledged, specific performance may be decreed.⁹² In the latter case cited, the court, in speaking of the statute prescribing the character of acknowledgments to any conveyance or other instrument conveying the separate property of married women, says that "it was not intended to limit or restrict her in the exercise of the right or power of alienation, to any character of conveyance or contract which she, in connection with her husband, might deem advantageous to be made with respect to her separate realty. . . . The statute does not attempt to define the character of conveyance or contract which would be necessary to transfer the title to the wife's separate property. Nor do we think that anything is contained in our law regulating conveyances, that would indicate that the legislature contemplated that the legal effect of any instrument executed by the wife to transfer her property was to be changed, or its status in any manner affected, by the privy examination of the wife. That examination was necessary to its validity to the extent of showing that she executed it voluntarily, etc. If she was free to act, and so declared herself, and that she wished not to retract it, the essential facts existed which, if properly embodied in an official certificate of acknowledgment, would make valid and binding the instrument so acknowledged. But the instrument itself was to be determined by the well-settled principles applicable to conveyances

⁹²Munk v. Weidner, 9 Tex. Civ. Coward. 79 Tex. 551, 15 S. W. 698. App. 491, 29 S. W. 409; Angier v.

of real property." In other words, the statute does not inhibit the wife from making, provided she does it in the manner provided by law, whatever contract she may choose to make with reference to her real property. Then, if she executes a bond for title, or by other contract in writing agrees to convey her separate estate, if such bond or other contract be properly acknowledged, specific performance may be enforced.⁹³

§ 75. Of Suretyship.

Viewed as a simple contract, the wife can enter into a contract of suretyship only where she could have made the contract as principal. That is, she cannot bind herself personally upon any undertaking, whether as principal or surety, except for the purposes hitherto defined. She may become a surety for her husband for those things for which she may lawfully contract alone, but for other purposes her signature as surety or indorser creates no liability.⁹⁴ But considering her power to pledge her property for another's debt, we are confronted with quite a different question. For from the earliest times her right to mortgage her property for her husband's debt has been recognized.⁹⁵ Her status when securing another's debt by mortgage upon her property is that of a surety, but the property only is bound, since her signing creates no personal liability, as already explained. Hence, any act upon the part of the other parties to the transaction that would operate as a release of her as surety if she were *sui juris*, would also operate to discharge her property thus mortgaged.⁹⁶

Thus, if the debt be barred by limitations as to her principal, she may plead the same and release her property;⁹⁷ or if an extension be given without her consent, her property is released.⁹⁸

⁹³Discussed. *post*. § 121.

⁹⁴*Wheeler v. Burks* (Tex. Civ. App.) 31 S. W. 434.

⁹⁵*Hollis v. Francois*, 5 Tex. 195; *Kavanaugh v. Brown*, 1 Tex. 481; *Rhodes v. Gibbs*, 39 Tex. 432: *post*, § 123.

⁹⁶*Beattie v. Keller* (Tex. Civ. App.) 49 S. W. 408; *Angel v. Miller*,

16 Tex. Civ. App. 679, 39 S. W. 1092; *Wofford v. Unger*, 55 Tex. 480.

⁹⁷*Washington L. Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123.

⁹⁸*Beattie v. Keller* (Tex. Civ. App.) 49 S. W. 408.

But if she consents to such an extension it is binding upon her, since it is a contract for the benefit of her separate estate.

The wife, by paying the debt for which she is thus surety, may be subrogated to the rights of the payee of the paper,⁹⁹ but otherwise if the payment be made from the husband's or the community funds, where the principal is her husband.¹⁰⁰ It is her right also, where the community as well as her separate estate stands charged for the debt, to have the property of that estate exhausted before resorting to hers.¹

§ 76. — Bonds.

It has been held that the act of the wife in signing the husband's supersedeas bond is void, there being no authority in law for her executing such an instrument for her husband's account;² and in that case our supreme court held that our court of civil appeals had the power, by affidavit or otherwise, to determine matters of fact necessary to the proper exercise of its jurisdiction, and to determine in such manner whether or not the applicant for such relief as surety upon such a bond was in fact a married woman, where such fact did not appear of record. As a necessary incident to her right to appear in court as a party, she would have the right to execute bonds for cost, trial of the right of property,³ sequestration, attachment, garnishment, and others necessary to the proper presentation of her suit or defense, whether with or without her husband's joinder or assent.

While she may not be a surety on another's bail bond, yet if she be the accused party her bond given to secure her release will be binding upon her as well as her sureties.⁴ "When a married woman may be appointed executrix or administratrix, she may, jointly with her husband, or without her husband, if he be absent from the state, or insane, or refuses to join with her, execute such bond as the law requires, and acknowledge the same before the county judge, county clerk, or any notary public of the coun-

⁹⁹Darrow v. Summerhill (Tex. Civ. App.) 58 S. W. 158.

¹⁰⁰Canfield v. Moore, 16 Tex. Civ. App. 472, 41 S. W. 718.

¹James v. Jacques, 26 Tex. 320.

²Cruger v. McCracken, 87 Tex. 584, 30 S. W. 537.

³Chapman v. Allen, 15 Tex. 278.

⁴C. C. P. art. 312.

ty where the will was proved or letters were granted: and such bond shall bind her separate estate in the same manner as if she were unmarried, but shall not bind her husband as surety, unless he sign and be approved as such."⁵

"When a surviving husband or wife under twenty-one years of age shall wish to accept and qualify as executor or executrix, or administrator or administratrix, he or she may execute such bonds as the law requires, and acknowledge the same before the county judge, county clerk, or any notary public of the county in which the will was proved or letters of administration were granted, and such bonds shall be as valid as if he or she were of lawful age."⁶

§ 77. As Stockholder in Certain Corporations.

Married women may be subscribers to the stock of corporations having for their purpose the support of any benevolent, charitable, educational, or missionary undertaking, or of any literary or scientific undertaking, the maintenance of a library, or the promotion of painting, music, and other fine arts. They may in such corporation become directors or officers thereof, and their acts, contracts, and deeds, for such purposes, are as binding and effective as if they were males, and the joinder and consent of their husbands and privy examinations separate and apart from them are not required.⁷

§ 78. May Dedicate Property to Public Use.

It is held by our supreme court that, since the dedication of land to public use may be complete without a deed, such a transaction does not, therefore, fall within the statute of conveyances of married women, and that a married woman can, therefore, make a dedication of her property to such use, if her husband assent, or ratify it after its appropriation by accepting compensation for its taking.⁸ Judge Elliott says that if the opening of the way will improve her adjoining land, she will then have the right to make a dedication under a power, as we have, to improve her separate property.⁹

⁵Rev. Stat. art. 1947.

⁶Ibid. art. 1948.

⁷Ibid. art. 644.

⁸San Antonio v. Grandjean, 91 Tex. 430, 41 S. W. 477, 44 S. W. 476.

⁹Elliott, Roads & Streets, § 103.

CHAPTER V.

GIFTS AND CONVEYANCES BETWEEN HUSBAND AND WIFE.

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| § 79. In General; Common Law; Spanish Law. | § 86. Wife's Conveyance to Trustee for Husband. |
| § 80. Of the Community Property. | § 87. Her Deed to Her Husband. |
| § 81. Deed without Consideration; Gift. | § 88. Wife as a Creditor of Husband. |
| § 82. Husband's Deed to Wife; Presumptions; Delivery. | § 89. — His Mortgage to Secure Her. |
| § 83. Verbal Sale or Gift between. | § 90. — Insolvent Husband Paying Wife. |
| § 84. — Evidence Necessary to Establish. | § 91. Separation Deeds. |
| § 85. Intention; Husband's Declarations as Evidence of. | § 92. Depositing Money in Wife's Name. |
| | § 93. Creditors. |

§ 79. In General; Common Law; Spanish Law.

The unity of husband and wife at common law forbade the making of gifts and conveyances by the one to the other, as it did ordinary contracts between them. This fiction was one of the best-settled fictions of that system. Upon marriage the wife was *civiliter mortua*. A transfer from one to the other had to be effected through a third person or trustee; the would-be grantor conveyed to the third party, and the third party in turn conveyed to the would-be grantee. But a direct conveyance by either to the other was void. But, the reason for this rule not being recognized by us, the intervention of such third person, except where necessary to meet the requirements of the statute of conveyances, is not required.¹ So, too, under the Spanish law donations between husband and wife were prohibited. This rule to be sure had its exceptions, one of which was that the donation

¹Fitts v. Fitts, 14 Tex. 443; Reynolds v. Lansford, 16 Tex. 287.

was valid if not revoked before the death of the donor.² But with us, the separate identity of the wife being admitted, as well as her right to receive and own property, the rules of those two systems have very little analogy to ours. Owning her property, she may do pretty much as she pleases with it, subject only to the consent of her husband; she may deal here much more freely than she may assume pecuniary liabilities by contract. Prior to the passing of laws regulating marital rights the Spanish rule obtained. Since then, although the body of the common law was thereby adopted, the rights of married women being specially defined, a wide divergence in the matter of her right to donate, convey, and receive and hold property to and from her husband, has been recognized.³ Generally, whatever may be the subject of a transfer, may be passed from one spouse to the other. More particularly, and with what limitations, will be seen in the succeeding sections of this chapter.

§ 80. Of the Community Property.

It can make but little difference whether the subject of the transfer be separate or the community property of the parties. The interest of each of the parties in the common property is as much the subject of their conveyance as though the entire estate were owned; and without anticipating a discussion of the nature of the interest of the partners in this common property, which belongs to a subsequent chapter⁴ of this work, it is sufficient to say here that, with the limitations hereafter noticed, either spouse may legally sell, transfer, or donate to the other his or her interest in the community property of the marriage.⁵ The

²Ferris v. Parker, 13 Tex. 385; Parker v. Chance, 11 Tex. 513.

³Hartwell v. Jackson, 7 Tex. 576; Reynolds v. Lansford, 16 Tex. 287; Fitts v. Fitts, 14 Tex. 443; Smith v. Strahan, 16 Tex. 314; Story v. Marshall, 24 Tex. 305; Smith v. Boquet, 27 Tex. 507; Bradshaw v. Mayfield, 18 Tex. 21; Cox v. Miller, 54 Tex. 16; Green v. Ferguson, 62 Tex. 525; Richardson v. Hutchins, 68 Tex. 81.

3 S. W. 276; Riley v. Wilson, 86 Tex. 240, 24 S. W. 394; Swearingen v. Reed, 2 Tex. Civ. App. 364, 21 S. W. 383; *ante*, 49.

⁴*Post*, chap. XIII.

⁵Hartwell v. Jackson, 7 Tex. 576; Parker v. Chance, 11 Tex. 513; Higgins v. Johnson, 20 Tex. 389; Dunham v. Chatham, 21 Tex. 231; Lewis v. Simon, 72 Tex. 470, 10 S. W. 554.

right of one to give his property, whether separate or community, to another, even though it be his marital consort, is absolute, where the principle is not violated that one must be just before he is generous.⁶ And even where the conveyance is in violation of the statute of frauds, it is nevertheless valid, where creditors and innocent purchasers do not complain.⁷ The husband may exchange the community property for the separate property of the wife, and *vice versa*.⁸ The writer cited gives two instances where such exchanges between husband and wife have been upheld.⁹

§ 81. Deed without Consideration; Gift.

In the absence of any evidence of intention outside of the deed, in a conveyance by the husband to the wife, and where it was shown that no consideration passed, and that that mentioned in the deed was merely nominal, our supreme court held that such deed "must be taken as evidencing the intention which, upon its face, it imports,—that is, to convey to the wife the estate of the husband in the property;" and very correctly reasoned that it must have been intended to have some operation upon the estate of the grantor, and that it must be taken to have changed the estate from community into separate property of the wife, in the absence of any other or different purpose in the making of the conveyance.¹⁰ For, as between the parties and those claiming under them, the deed, being without consideration, will be upheld as a gift;¹¹ provided the rights of others are not prejudiced.¹²

But where the husband conveys land to his wife by deed to take effect "at and after his death," whether construed as a deed or will, the wife takes no separate estate in another tract received in exchange therefor, where she voluntarily joins her husband in the deed thereto, and the tract so received is deeded to the husband,¹³ such acts amounting to a waiver.

⁶Bruce v. Koch (Tex. Civ. App.) 40 S. W. 626; Cheek v. Herndon, 82 Tex. 146, 17 S. W. 763; Herndon v. Reed, 82 Tex. 647, 18 S. W. 665.

⁷Miller v. Koertge, 70 Tex. 162, 7 S. W. 691.

⁸Bal. Com. Prop. 90.

⁹Labbe v. Abat, 2 La. 53; Fuller v. Ferguson, 26 Cal. 547.

¹⁰Story v. Marshall, 24 Tex. 305.

¹¹Stafford v. Stafford, 41 Tex. 111.

¹²Pearce v. Jackson, 61 Tex. 642.

¹³Phillips v. Phillips (Tex. Civ. App.) 57 S. W. 59.

§ 82. Husband's Deed to Wife; Presumptions: Delivery.

As between the parties and those claiming under them, the presumption obtains, from the making of a deed by the husband to the wife, that it was the intention of the grantor to transfer separate or community interest in the subject of the conveyance, to the wife to be her separate property.¹⁴ Indeed, it is hardly proper to speak of it as a presumption merely, for its effect is to pass the title absolutely, subject only to be impeached as similar conveyances between strangers. As to what will constitute a delivery of such a deed, it is a question of intention. Under our laws the husband has the exclusive control of the wife's property, and this without regard to the source of her title: by virtue of this right he is entitled to the possession of whatever appertains to her property, including her muniments of title. A delivery by a stranger of the wife's title papers to the husband would be a delivery to her. It follows, then, that should the husband execute to the wife a conveyance, although he retains the manual possession thereof, it would be held, unless a contrary intention is shown, that his possession is the possession of the wife, and a delivery be presumed as matter of fact and of law.¹⁵ There is nothing inconsistent in the possession of the husband, with ownership by the wife; indeed he is the only person authorized by law to manage and control her separate property, and for such purposes he is entitled, even as against the wife herself,¹⁶ to its possession.

It is not necessary that the husband should declare that the conveyance is to the sole and separate use of the wife; the instrument could have no other meaning.¹⁷

§ 83. Verbal Sale or Gift between.

From what has gone before, it will be perceived that there is no difficulty in assenting to the doctrine allowing gifts and con-

¹⁴Hunter v. Hunter (Tex. Civ. App.) 45 S. W. 820.

¹⁵Richardson v. Hutchins, 68 Tex. 81, 3 S. W. 276; McCartney v. McCartney, 93 Tex. 359, 55 S. W. 310.

¹⁶Brown v. Brown, 61 Tex. 56.

¹⁷Lewis v. Simon, 72 Tex. 470, 10 S. W. 554; Callahan v. Houston, 78 Tex. 494, 14 S. W. 1027; Swearingen v. Reed, 2 Tex. Civ. App. 364, 21 S. W. 383.

veyances between husband and wife. The one may convey to the other his property, upon any consideration, whether valuable or good, and the sale, gift, or donation, except where interdicted by the statute of frauds, may as well be oral as written. The only seeming difficulty in the application of the rule is in the avenues for fraud and false swearing thus opened up. But this is not a real objection, and greater harm would come from the adoption of a rule forbidding all gifts and conveyances between them, besides the fact that such a rule would be at total variance with the whole scheme of our marital-rights laws, which especially recognize the wife's individuality and capacity to own property, and hence her consequent right to acquire it by all the ways usual.

§ 84. — Evidence Necessary to Establish.

Verbal sales and gifts between husband and wife ought not to be admitted, however, except upon clear and satisfactory evidence that the title to the property was divested out of the vendor or donor and vested in the vendee or donee.¹⁸ Such transactions ought, for reasons that readily suggest themselves, to be subjected to the closest scrutiny, and not sustained except upon the clearest proof of their *bona fides*.¹⁹ But this rule, while salutary on principle, and confessedly sound as a legal proposition, is one much subject to abuse, as trial courts and juries are not infrequently slow to give proper consideration to testimony relative to such transactions.

§ 85. Intention; Husband's Declarations as Evidence of.

It is apparent that the intention of the parties is of vital importance; and in arriving at a knowledge of that intention, resort may be had to the declarations and acts of the husband, where he is the grantor or donor and the wife the grantee or donee.²⁰ In *Smith v. Strahan*, 25 Tex. 103, Wheeler, Ch. J., says: "The acts and declarations of the husband before the taking of the conveyance, having reference to it, and corresponding with his after acts, evidencing his intention and purpose re-

¹⁸*Bradshaw v. Mayfield*, 18 Tex. 21. *Faulk v. Faulk*, 23 Tex. 653.

¹⁹*Kendrick v. Taylor*, 27 Tex. 695; *German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344.

Barziza v. Graves, 25 Tex. 322; M. W.—6.

specting it, and the subsequent statements of the wife, in so far as they conduced to countervail the prima facie inference deducible from the fact of taking the deed in her name, were admissible and proper to be submitted to the jury for their consideration, in coming to a conclusion upon the question whether the real intention and purpose of taking the deed in the name of the wife was to make a donation or gift of the property to her sole and separate use." And in *Richardson v. Hutchins*, 68 Tex. 81, 3 S. W. 276, where the husband surrendered an obligation for bonds, and took in its place a new obligation in his wife's favor, and which was delivered to a third person with instructions to collect and hold the interest for the wife's benefit, although he afterwards resumed possession of the obligation and used its proceeds, where he had repeatedly declared, before and afterwards, that he intended a gift to his wife, the court held such facts and declarations sufficient to establish a gift to his wife. Many authorities might be cited to the point that the husband's declarations accompanying the act of causing a conveyance to be made to the wife in her own name are admissible as bearing upon his intention of making her a gift of the property.²¹

It must not be understood, however, that the intention of the husband in making a conveyance to his wife can be inquired into when that intention would have the effect of contradicting or varying the effect of an executed conveyance in passing the title.²² His intention may be material upon the question of the execution of the instrument,²³ but cannot vary the effect of a completed conveyance. A rule permitting grantors to contradict the plain import of their solemn deeds, even between the parties themselves, would be fraught with much mischief. The case of *Kahn v. Kahn* (Tex. Civ. App.) 56 S. W. Rep. 946, permitted evidence of the husband's intention in executing to his wife a conveyance, and is apparently opposed to the rule as above announced. The effect of the holding was to decide that a deed

²¹Higgins v. Johnson, 20 Tex. 389; Goldberg v. McCracken (Tex.) 8 S. W. 676; Branch v. Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050. See *post*, § 217.

²²Lott v. Kaiser, 61 Tex. 665.

²³McCartney v. McCartney, 93 Tex. 359, 55 S. W. 310.

duly executed and delivered by the husband to the wife had no effect whatever upon the property attempted to be conveyed, and was based upon the reasoning that her separate rights, if any, were dependent upon the truth of the recitation that the consideration was of her separate estate, when in truth the question of consideration is not pertinent, nor such recitation in the deed material.²⁴

That such a conveyance was intended as a mortgage or otherwise in trust could, of course, be shown.²⁵

§ 86. Wife's Conveyance to Trustee for Husband.

The wife may as lawfully convey her property to the husband as he to her. If there were no statute disabling her from conveying except by a deed in which he joins, her power to convey directly to him without the intervention of a third person would be as clear as his power to convey directly to her. There is nothing in the statutes regulating her conveyances which would in any manner prevent her conveying to the husband if done through the intervention of a trustee. The provisions of the statute are for her protection, and when a conveyance is made to a third person with the intention of immediately having it reconveyed to the husband, the wife is as fully protected by a privy examination as though there was no such intention of reconveyance. Her husband's joinder in the deed is supposed to be for the purpose of protecting her against the undue influence of others, and to give to her such counsel and advice in relation to the transaction as it is to be presumed that a husband, having due regard for the interests of his wife, as well as for his own interest, would always be ready to give. But nowhere does the statute require that the wife be counseled by the husband, and a deed properly signed and acknowledged by both husband and wife would be as valid without any communication whatever, as it would if executed after the most deliberate consultation. That she is under such circumstances probably denied his fair and unbiased advice is doubtless true. But the law can only

²⁴See *ante*, § 82. This case has been reversed by the supreme court (58 S. W. 825), and the doctrine of the case supported.

²⁵Hunter v. Hunter (Tex. Civ. App.) 45 S. W. 820.

give her an opportunity for seeking his counsel: it cannot vouch that his advice will be given at all or that when given it will be wise. Such a conveyance, then, meeting the requirements of the statute, the conveyance by such third person will have the effect of vesting the property in the husband.²⁶

§ 87. Her Deed to Her Husband.

But evidently this is the only way by which a conveyance to the husband may be effected by the wife: for she cannot, by reason of the plain mandates of the statute, convey directly her real property to him. The husband may make such conveyance, but he is not restricted by statute to a particular mode. Her inability to convey by a direct deed is purely by force of the statute; not arising from the common-law fiction of unity at all, for any property other than real she may convey directly to him. Where she attempts to convey to him her act is simply void, and the questions of consideration²⁷ or intention, or estoppel and the like, has nothing to do with it. The recording of such a pretended deed is no record notice, and will not put a person who actually reads the record upon any notice, or elicit an inquiry by him of the wife's separate interest in the land.²⁸

§ 88. Wife as a Creditor of Husband.

The right to contract in a limited sense, and to make sales and conveyances generally between the spouses, begets often the relation of debtor and creditor between them. That the wife can seldom be the debtor has already sufficiently appeared. But for the husband to become the wife's debtor is a thing of frequent occurrence. This is brought about in numerous ways. He may borrow her money or buy her property, or convert it, and in any of these cases the law will regard her as upon the same footing with other creditors. A conveyance made by him in payment, or a promissory note executed to her in settlement²⁹

²⁶Riley v. Wilson, 86 Tex. 240, 24 S. W. 394.

²⁷Graham v. Stuve, 76 Tex. 533, 13 S. W. 381.

²⁸Stiles v. Japhet, 84 Tex. 91, 19

S. W. 450. See McDonna v. Wells, 1 Posey, Unrep. Cas. (Tex.) 35.

²⁹Price v. Cole, 35 Tex. 461; Hall v. Hall, 52 Tex. 294.

of any of his liabilities to her, is valid and binding as though it were given by or to any other person. Payment by the wife of the husband's draft at his request was held to establish between them the relation of creditor and debtor.³⁰

§ 89. — His Mortgage to Secure Her.

The right to accept a mortgage as security for the payment of her debt from her husband is corollary to her right to accept a conveyance in payment of it. And her right to a foreclosure is further incidental to her right to collect her debt. Her coverture does not prevent her contracting with her husband, or anyone else as to that, for security by mortgage or otherwise, for a debt justly owing to her. The mortgage may be made directly to her,³¹ or it may be made to a trustee for her benefit, as is most frequently done.

§ 90. — Insolvent Husband Paying Wife.

The general rule may be said to be that the husband, although he may be insolvent, may, if the conveyance be made bona fide and not for the purpose of hindering and delaying his other creditors, transfer to his wife property in satisfaction of a debt owing by him to her, provided that no more property is conveyed than is reasonably sufficient to pay the debt.³² In the case of *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840, cited, the husband, being indebted to the wife in a large amount, conveyed property to her in satisfaction of a portion of the indebtedness. The charge of the court was in accordance with the rule as above stated, and the jury instructed that if more property was conveyed than was reasonably required to discharge such portion of the debt, the conveyance would be void as to creditors. And the fact, it was said, that he owed her other sums not included in the conveyance was no protection, but rather "additional evidence of fraud." He may exercise the common right to prefer a cred-

³⁰*Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840.

³¹*Price v. Cole*, 35 Tex. 461.

³²*Cox v. Miller*, 54 Tex. 16; *Mc-*

Kamey v. Thorp, 61 Tex. 648; *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840; *Massie v. McKee* (Tex. Civ. App.) 56 S. W. 119.

and that his wife, although the result may be to leave and hinder his other relations in the education of their child, one such agreement is stated above to be made freely and for the good of the child, and that a husband and wife though his purpose was to hinder his other relations, and such purpose was known, yet if there existed a child, and the husband such purpose was a reasonable ground for the bona fide purpose of taking payment of it, it is not void.²

§ 91. Separation Deeds.

While all contracts and deeds for future separation are, upon grounds of public policy, void, still, if the spouses are actually separated and living apart, or have determined upon separation, and are in the act of executing a conveyance by the husband attended as a provision for the support of the wife, will be upheld.³ The deeds or other contracts which in law are deemed void are so because of their being based upon separation as a consideration. But where, as vicarious co-spouse and convey, and even freely donate, his property to the other, a contract between them looking to a division of their property, when fairly made and free from fraud and undue influence, ought not, because it is incidental to a separation of the parties, to be held void.⁴ The husband may be thus disposed of.⁵ The principle is that such transactions are permissible, under the liberal rules of our laws, between husband and wife generally, and that they are not vitiated by an actual or contemplated separation. They do not depend upon the separation for their consideration, for that would be none.

²Thompson v. Hervey, 2 Tex. App. Civ. Cas. (Wilson) §§ 306, 307.

³Weir Plow Co. v. Carroll, 5 Tex. App. Civ. Cas. (Wilson) § 178, 15 S. W. 123.

⁴Hamilton-Brown Shoe Co. v. Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520. See also Lang v. Rickmers, 70 Tex. 108, 7 S. W. 527, and list of authorities cited in note in S. W. Rep.

⁵Rains v. Wheeler, 76 Tex. 390, 13 S. W. 324.

⁶Andrus v. Randon, 34 Tex. 536; Caffey v. Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738; Batla v. Batla, Tex. Civ. App., 51 S. W. 664; Moor v. Moor, Tex. Civ. App., 57 S. W. 992.

⁷Edmonson v. Blessing, 42 Tex. 596; Riley v. Wilson, 86 Tex. 240, 24 S. W. 394.

It does not follow that a note given by the husband in consideration that the wife continue to live with him would also be valid and binding, but rather upon the principle stated that the reverse is true.³⁹ He would certainly not be bound unless the intention was to make her a gift of the proceeds regardless of whether or not she continued to live with him.

It is hardly necessary to add that by a reconciliation of ruptured conjugal relations, and a mutual disposition to regard the agreement as no longer in force, followed by resumption of the marital relation, such articles would be held not binding upon either party.⁴⁰ But it is well to add further that where the division is made in contemplation of a permanent separation, and is acted upon by both parties for a considerable time, the fact that the parties subsequently live together will not, in the absence of evidence indicating an intention upon their part to treat the agreement as not binding, have the effect of altering the status of the property which by the terms of the agreement becomes vested in the respective parties.⁴¹

§ 92. Depositing Money in Wife's Name.

As a circumstance within itself insufficient to show an intention upon the part of the husband to make a gift to his wife by a deposit of money in bank in her name, the case of *Wellborn v. Odd Fellows Bldg. & Exch. Co.* 56 Tex. 501, is in point. There the husband made a deposit of money, taking the receipt in his wife's name, but did nothing further to evidence an intention to make her a gift of it; but, on the contrary, afterwards conditionally promised payment of his debt out of the fund; it was considered insufficient evidence to establish a gift. On principle such ought at least to show *prima facie* an intention of gift. In the absence of further explanation, such conduct should be held to evidence some intention concerning the deposit, and, being tantamount to handing her the money in person, that it was his intention to make her a gift of it, is the most reasonable.

³⁹*Roberts v. Frisby*, 38 Tex. 219.

⁴⁰*Batla v. Batla* (Tex. Civ. App.)

⁴¹*James v. James*, 81 Tex. 373, 16 S. W. 1087.

51 S. W. 664.

§ 93. Creditors.

In the foregoing part of this discussion we have noticed transactions between the husband and wife mainly as they affect the immediate parties and those claiming under them. But many transactions will be binding between the parties which are absolutely void as to their creditors. We have seen that the husband may transfer to his wife property in payment of a debt if the same be done openly and for the bona fide purpose of paying a bona fide debt, and subject to the restriction that no more property be conveyed than is reasonably necessary to its discharge. This he may do in spite of other creditors. It is but preferring one creditor over another, and the doctrine of preferences is firmly grounded in our decisions. But a transfer to her of property without such bona fide intention is a fraud of an aggravated form. His right to mortgage or pledge her his property is equal to his right to convey it to her in payment. We have seen, too, that he may make her an absolute gift of his property,⁴² but this he cannot do save when he is under no obligation to his creditors. For the rule that one must be just before he is generous is never more applicable than to just such a case.⁴³ His conveyance to a third person, who in turn conveys to the wife, is subject to the same objection,⁴⁴ that is, that it is a fraud upon an existing creditor.⁴⁵ Creditors have no concern with his disposition of property that is exempt by law from sale for the satisfaction of their debts.⁴⁶ But objection can be made by those only who were creditors at the time of the transfer,⁴⁷ and to those who are not such creditors it can make no difference whether the conveyance be bona fide or not.

⁴²Morrison v. Clark, 55 Tex. 437;
Van Bibber v. Mathis, 52 Tex. 406.

⁴³Donnebaum v. Tinsley, 54 Tex.
362; Belt v. Raguet, 27 Tex. 471.

⁴⁴Reynolds v. Lansford, 16 Tex.
287.

⁴⁵Raymond v. Cook, 31 Tex. 374.

⁴⁶See *post*, § 217.

⁴⁷De Garca v. Galvan, 55 Tex. 53.

CHAPTER VI.

WIFE'S CONVEYANCES.

- § 94. Under Early Laws.
- § 95. Act of 1841 Prescribing Mode.
- § 96. Act of April 30, 1846.
- § 97. Revision of 1879; Present Statute.
- § 98. Scope and Object of Statutes.
- § 99. She May Convey to Any Use.
- § 100. The Deed; Its Form.
- § 101. Joinder of the Husband.
- § 102. — When Husband is Not Sui Juris.
- § 103. — When Husband is Insane.
- § 104. — Further of the Community Property.
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- § 125. Extent of Estate Conveyed; After-Acquired Title.

§ 94. Under Early Laws.

The Spanish law was in force with us until the adoption of the common law, which, in so far as it relates to conveyances, was in December, 1836. But the adoption of the common law of conveyances threw very little light upon the matter of the wife's conveyances,¹ and the former rules obtained with us until the

¹Say. Ear. L. of Tex. art. 115.

subsequent act of 1841, prescribing the mode of conveyance by a married woman. It was early evident to our legislators that our changed conditions, so widely different from those where the common law had always obtained, demanded such additional legislation. If the wife was to own property, her incidental right to dispose must be regulated. The Spanish law permitted the wife to alien her paraphernal property with the husband's assent,² and since no particular form of conveyance or ceremony of acknowledgment was prescribed, a parol sale was considered valid. The reason for requiring the husband's assent was that he was entitled to the fruits and revenues of the property to aid him in the support of the family, and if she were permitted to convey without such assent he might thereby be prejudiced. This being the ground, if it appeared that the bargain was to her advantage, and not to his injury, his assent might be dispensed with. If he refused to assent where he ought, the court might give the proper permission,³ or it might do so where the husband was absent, and delay might be dangerous.⁴ Where there was a written conveyance it was not necessary that this assent should appear upon the face of the instrument,⁵ for he might ratify it subsequently, or, as just explained, his assent might be dispensed with entirely. Assent would be presumed after a considerable lapse of time, in which the husband acquiesced in the wife's deed.⁶

§ 95. Act of 1841 Prescribing Mode

"From and after the passage or approval of this act, when a husband and his wife have sealed and delivered a writing purporting to be a conveyance of any estate or interest in any land, slave or slaves, or other effects, the separate property of the wife, if she appear before any judge of the district court, or chief justice of the county court, and, being examined privily and apart from her husband, shall declare that she did freely and willingly seal and deliver the said writing (to be then shown and explained to her), and wishes not to retract it, and shall ac-

²Allen v. Urquhart, 19 Tex. 481.

³Hollis v. Francois, 5 Tex. 195.

⁴Schmidt's Civil Law, art. 42.

⁵Harvey v. Hill, 7 Tex. 591.

⁶Poor v. Boyce, 12 Tex. 440; McKissick v. Colquhoun, 18 Tex. 148.

knowledge the said writing so again shown to her to be her act; such privy examination, acknowledgment, and declaration, the said judge or chief justice shall certify under his hand and seal by a certificate annexed to said writing, and to the following effect, or substance thereof, that is to say:

“Republic of Texas, {
County of ———. }

“I. A. B., chief justice of the county aforesaid, do hereby certify, that E. F., the wife of G. H., parties to a certain deed, bearing date on the ——— day of ———, and hereunto annexed, personally appeared before me, the chief justice of the county aforesaid, and having been examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said E. F., acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

“Given under my hand and seal this ——— day of ———.

[SEAL]

“But any certificate showing that the requisites of the law have been complied with shall be as valid as the form here prescribed, and such conveyance shall pass all the right, title, and interest, which the husband and wife, or either of them, may have in or to the property therein conveyed.”⁷

§ 96. Act of April 30, 1846.

“That when a husband and his wife have signed and sealed any deed or other writing purporting to be a conveyance of any estate or interest in any land, slave or slaves, or other effects, the separate property of the wife, or of the homestead of the family, or other property exempted by law from execution, if the wife appear before any judge of the supreme or district court, or notary public, and being privily examined by such officer, apart from her husband, shall declare that she did willingly sign and seal the said writing, to be then shown and explained to her, and

⁷Hart. Dig. 173; P. D. art. 1003,
n. 427.

wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her, to be her act, thereupon such judge or notary shall certify such privy examination, acknowledgment, and declaration, under his hand and seal, by a certificate annexed to said writing, to the following effect or substance, *viz.*:

“State of Texas, }
County of _____. }

“Before me, _____, judge of or notary public of _____ county, personally appeared _____, wife of _____, parties to a certain deed or writing bearing date on the — day of _____, and hereto annexed, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said _____, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it; to certify which I hereto sign my name and affix my seal, this — day of _____, A. D. _____.

“But any certificate showing that the requisites of the law have been complied with shall be as valid as the form here prescribed; and such deed or conveyance, so certified, shall pass all the right, title, and interest which the husband and wife, or either of them, may have in or to the property therein conveyed.”⁸

The act specially provided that its application should be to the exemptions of homestead and other property which the Constitution provided might be protected to the family, as well also to the property owned or claimed by the wife before marriage, and that acquired afterwards by purchase, gift, devise, or descent,⁹ and repealed all former laws prescribing the mode of conveyance of property in which the wife had an interest.¹⁰

§ 97. Revision of 1879; Present Statute.

“The husband and wife shall join in the conveyance of real

⁸P. D. art. 1003.

¹⁰Ibid. art. 1006.

⁹Ibid. art. 1005.

estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband, before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded and certified to, in the mode pointed out in article 4643."¹¹ "The homestead of a family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto; and also by her separate acknowledgment thereof taken and certified to before the proper officer and in the mode pointed out in article 4643."¹²

"No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment, on an examination privily and apart from her husband; nor shall he certify to the same unless she thereupon acknowledges to such officer that the same is her act and deed, and that she has willingly signed the same, and that she wishes not to retract it."¹³

"The certificate of acknowledgment of a married woman must be substantially in the following form:

"The State of——,)
County of——.)

"Before me, —— (here insert the name and character of the officer) on this day personally appeared ——, wife of ——, known to me (or proved to me on the oath of ——) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said ——, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the pur-

¹¹Rev. Stat. 1895, art. 635; Sayles. Stat. 1897, art. 635, where the correct reference is made to article 4621.

¹²Rev. Stat. 1895 art. 636; Sayles Stat. 1897, art. 636.

¹³Ibid. art. 4618.

itor and pay his wife,³³ although the result may be to delay and hinder his other creditors in the collection of their debts; but such payment, as stated above must be made openly and for the bona fide purpose of paying a debt;³⁴ and even though his purpose was to defraud his other creditors, and such purpose was known, yet if there existed a debt, and she accepted such property to a reasonable amount for the bona fide purpose of taking payment of it, it is yet valid.³⁵

§ 91. Separation Deeds.

While all contracts and deeds for future separation are, upon grounds of public policy, void, still, if the spouses are actually separated and living apart, or have determined upon separation, and are in the act of executing it, a conveyance by the husband, intended as a provision for the support of the wife, will be upheld.³⁶ The deeds or other contracts which in law are deemed void are so because of their being based upon separation as a consideration. But where, as with us, each spouse may convey, and even freely donate, his property to the other, a contract between them looking to a division of their property, when fairly made and free from fraud and undue influence, ought not, because it is incidental to a separation of the parties, to be held void.³⁷ The homestead may be thus disposed of.³⁸ The principle is that such transactions are permissible, under the liberal rules of our laws, between husband and wife generally, and that they are not vitiated by an actual or contemplated separation. They do not depend upon the separation for their consideration, for that would be none.

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³⁴Weir Plow Co. v. Carroll, 4 Tex. App. Civ. Cas. (Willson) § 178, 15 S. W. 123.

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As a circumstance within itself insufficient to show an intention upon the part of the husband to make a gift to his wife by a deposit of money in bank in her name, the case of *Wellborn v. Odd Fellows Bldg. & Exch. Co.* 56 Tex. 501, is in point. There the husband made a deposit of money, taking the receipt in his wife's name, but did nothing further to evidence an intention to make her a gift of it; but, on the contrary, afterwards conditionally promised payment of his debt out of the fund; it was considered insufficient evidence to establish a gift. On principle such ought at least to show *prima facie* an intention of gift. In the absence of further explanation, such conduct should be held to evidence some intention concerning the deposit, and, being tantamount to handing her the money in person, that it was his intention to make her a gift of it, is the most reasonable.

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subsequent act of 1841, prescribing the mode of conveyance by a married woman. It was early evident to our legislators that our changed conditions, so widely different from those where the common law had always obtained, demanded such additional legislation. If the wife was to own property, her incidental right to dispose must be regulated. The Spanish law permitted the wife to alien her paraphernal property with the husband's assent,² and since no particular form of conveyance or ceremony of acknowledgment was prescribed, a parol sale was considered valid. The reason for requiring the husband's assent was that he was entitled to the fruits and revenues of the property to aid him in the support of the family, and if she were permitted to convey without such assent he might thereby be prejudiced. This being the ground, if it appeared that the bargain was to her advantage, and not to his injury, his assent might be dispensed with. If he refused to assent where he ought, the court might give the proper permission,³ or it might do so where the husband was absent, and delay might be dangerous.⁴ Where there was a written conveyance it was not necessary that this assent should appear upon the face of the instrument,⁵ for he might ratify it subsequently, or, as just explained, his assent might be dispensed with entirely. Assent would be presumed after a considerable lapse of time, in which the husband acquiesced in the wife's deed.⁶

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²Allen v. Urquhart, 19 Tex. 481.

³Hollis v. Francois, 5 Tex. 195.

⁴Schmidt's Civil Law, art. 42.

⁵Harvey v. Hill, 7 Tex. 591.

⁶Poor v. Boyce, 12 Tex. 440; McKissick v. Colquhoun, 18 Tex. 148.

knowledge the said writing so again shown to her to be her act; such privy examination, acknowledgment, and declaration, the said judge or chief justice shall certify under his hand and seal by a certificate annexed to said writing, and to the following effect, or substance thereof, that is to say:

“Republic of Texas, {
County of ———. }

“I. A. B., chief justice of the county aforesaid, do hereby certify, that E. F., the wife of G. H., parties to a certain deed, bearing date on the ——— day of ———, and hereunto annexed, personally appeared before me, the chief justice of the county aforesaid, and having been examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said E. F., acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

“Given under my hand and seal this ——— day of ———.

[SEAL]

“But any certificate showing that the requisites of the law have been complied with shall be as valid as the form here prescribed, and such conveyance shall pass all the right, title, and interest, which the husband and wife, or either of them, may have in or to the property therein conveyed.”⁷

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⁷Hart. Dig. 173; P. D. art. 1003,
n. 427.

poses and consideration therein expressed, and that she did not wish to retract it.

“Given under my hand and seal of office this ——— day of ———, A. D. ———. ——— ———.”¹⁴

§ 98. Scope and Object of Statutes.

It was not the object of the various statutes to confer upon the wife the right to dispose of her separate property, for she has this right independent of statutes. But the evident intention of the provisions regulating her conveyances was that they should be a safeguard and a protection to her. Against the encroachments of those who might deprive her of her property, the joinder of her husband is required, thus presupposing his counsel and sanction; and further, lest she be unduly influenced by him to dispose of her property in a manner not advantageous to her, it is required that the officer taking her acknowledgment do so “privily and apart” from him, thereby removing as far as possible every possible influence, and leaving her free to act as she may see proper. The statute does not declare void any other mode of conveyance, but recognizes as valid any other form of certificate substantially in compliance with that prescribed. The provisions are not to be understood as directory merely, for they are mandatory. An instrument not executed in accordance therewith, at least substantially, is a nullity.

§ 99. She May Convey to Any Use.

It is well to notice in the outset that the law does not undertake to say what disposition she may or may not make of her property. Her right in this respect is unlimited.¹⁵ She may own property in her own right as absolutely as if she were sole Subject only to the consent of her husband, and the requirements of the statute in the manner of affecting it by written instruments, she may do with it as she pleases. She may sell, exchange, pledge, mortgage, or even give it away. We must not confound the rule as here laid down with the more restricted right of the wife to contract a pecuniary obligation, and thus

¹⁴Ibid. art. 4621.

¹⁵Rhodes v. Gibbs, 39 Tex. 432.

render liable her property. What we are here discussing is quite a different thing. The framers of our laws have thought it impolitic to permit her freedom in matters of simple contract, but have never questioned her right to do what she pleased with her property, further than to regulate the manner of her doing it.

§ 100. The Deed; Its Form.

By an examination of the statute it will be seen that the following are essential features of every conveyance, *viz*: (1) The joinder of her husband; (2) the privy examination, including her acknowledgment and declaration; (3) the certificate of the officer taking her acknowledgment; and (4) the seal. These will be treated separately.

§ 101. Joinder of the Husband.

Prior to our statutes it was not essential that the husband should join the wife in a conveyance of her separate property; he need only give his assent thereto, which did not have to appear in the face of the instrument, for, indeed, except in cases of land, no formal deed was necessary at all.¹⁶ The act of 1841 provided for the wife's acknowledgment when the "husband and wife have sealed and delivered" a writing; that of 1846, when "a husband and his wife have signed and sealed any deed," etc., and subsequent acts that "the husband and wife shall join" in the conveyances of the wife's real estate. This being so, the attempted conveyance of the wife, without such joinder, is a nullity.¹⁷ It is not a question of his willingness or assent to the sale, but is a positive requirement to the validity of the instrument. So, if he acquiesce in the disposition, and even accept the purchase money, the rule is not changed.¹⁸ The word "conveyance" is used in this connection in a very broad sense. It embraces any and all written instruments in any way affecting her

¹⁶Allen v. Urquhart, 19 Tex. 481.

45 S. W. 857, Reversed on other grounds in 92 Tex. 251, 47 S. W. 717.

¹⁷Coleman v. Vollmer (Tex. Civ. App.) 31 S. W. 413; Garcia v. Illg,

¹⁸Ford v. Ballard, 1 Tex. Civ. App.

14 Tex. Civ. App. 482, 37 S. W. 471,

376, 21 S. W. 146.

land. A receipt signed by the wife alone, acknowledging the payment of a sum of money in satisfaction of her interest in the community land of her parents, and releasing and relinquishing all her right, title, and interest in and to such estate, where such receipt was not acknowledged as required by law, and where the husband did not join, was held to be within the statute, and consequently inoperative as a release of the wife's interest in the estate.¹⁹ While the husband must "join" the wife in the conveyance, the statute does not contemplate that their acknowledgments must be simultaneous; in the nature of the requirements this cannot be done, for she must be examined "privily and apart" from him. It can make no difference which executes first, nor is it material that the same officer shall take both acknowledgments, or that they are both embodied in the same certificate. No good reason can be conceived why any lapse of time between the acknowledgments of the parties would invalidate a conveyance otherwise good. The only effect of such delay being that the deed does not take effect until both have signed and acknowledged. No precise time can be stated as the utmost which the law will allow to intervene between the acknowledgments. The true rule doubtless is, that the delayed acknowledgment may be supplied at any time during the existence of the marriage,²⁰ and, in the absence of any intervening rights of third persons, the act will date back to the original transaction, and no new delivery will be required. But for obvious reasons such acknowledgment and joinder ought not to be permitted after the death of the other spouse.²¹ Separate deeds executed by the spouses could hardly be denominated a joint conveyance, such as our statute seems to contemplate,²² yet our court of civil appeals in *Rogers v. Roberts*, 13 Tex. Civ. App. 190, 35 S. W. 76, has said that separate deeds would meet the requirement of the statute; the language being used, however, in an argumentative way, and not as a decision. That case, however, holds that a wife may convey for herself and for her husband by virtue of a power

¹⁹*Stephens v. Shaw*, 68 Tex. 261, 4 S. W. 458; but see *French v. Strumberg*, 52 Tex. 92, *ante*, 63.

²⁰*Halbert v. Hendrix* (Tex. Civ. App.) 26 S. W. 911.

²¹*Chester v. Breitling* (Tex. Civ. App.) 30 S. W. 464; S. C. 88 Tex. 586, 32 S. W. 527.

²²*Dickinson v. McLane*, 57 N. H. 31.

of attorney from him, and that his joinder is thus accomplished. If this be true, then the husband may as well delegate his authority to a stranger to join the wife in her conveyances, and a wide departure from the real purpose of the act has been permitted. He may waive his assent to the disposition of her property where no deed is required, for it is for his exclusive benefit, and no statute requires it; but if he may thus delegate his power to another to join in her conveyances, she is compelled to seek counsel of another than the one whom the law has named for such purpose.

The wife's power of attorney, bond for title, and any and all other instruments affecting her real property must be signed and acknowledged by the husband.²³

§ 102. — When Husband is Not Sui Juris.

By express provision of law an infant female becomes of full age upon her marriage. No such provision exists with reference to the husband. He is a minor until he reaches the full age of twenty-one years, and as such subject to all the disabilities of infancy. Marriage within itself will not have the effect of relieving one of infancy in the absence of a statute to such effect.²⁴ The statute provides that a minor may give his consent to any agreement which the marriage-settlement contract is susceptible of,²⁵ but even then it must be with the written consent of the parents or guardian of such minor; and it is held that such power is special, and does not have the effect of conferring upon an infant the powers of his majority.²⁶ Then, since the husband's assent evidenced by his joinder in her deed is in its nature a contract by him, such contract may be avoided upon his arriving at his majority; and if avoided by him it would be void as to her.²⁷ Her power to convey during his infancy is more analogous to her power to convey where he is insane than where he has deserted her.

²³*Post*, §§ 120, 121; *ante*, § 41.

²⁴*Burr v. Wilson*, 18 Tex. 368.

²⁵Rev. Stat. art. 2964.

M W.—7.

²⁶*Burr v. Wilson*, 18 Tex. 368.

²⁷*Barker v. Wilson*, 4 Heisk. 268.

§ 103. — When Husband is Insane.

Our statute provides for the appointment of guardians of persons of unsound mind,²⁸ and the court is authorized to make orders for the support of such person's family and the education of his children when necessary;²⁹ and under these statutes it is held that where the husband is insane the wife has no power to convey either the husband's separate property or the community property during the period of such insanity.³⁰ The law provides for just such an emergency, and prior to the statute noticed in the next succeeding section the wife, as such, lost all control of the community upon the husband's becoming insane. But the effect of the husband's insanity upon the power of the wife over her separate property is quite another thing. If the reasoning from which is deduced her right to convey upon his abandoning her be sound,³¹ then equally as strong reasons exist in favor of her right of alienation in cases of his insanity. The right to own property carries with it the right to a beneficial enjoyment thereof, and one of the most valuable incidents of ownership is the right of disposition. The statute, or some judicial interpretation thereof, gives to every owner a right in some way to dispose of his or her property, and the wife of an insane person is no exception. The law, while it requires the joinder of the husband in the conveyance of her land, and his assent to sales of her personal property, has by the courts been interpreted to give her the right to act alone, when, by reason of abandonment, permanent separation, or conviction of crime, his conveyance or assent cannot be obtained; and upon these authorities, and the most obvious principles of common justice, the conveyance of a married woman of her separate property, without the assent or joinder of her insane husband, who is incapable of assenting or joining, ought to be held valid.³²

²⁸Rev. Stat. art. 2550.

²⁹Post, § 105.

³⁰Ibid. art. 2743.

³¹Clark v. Wicker (Tex. Civ. App.)

³²Heidenheimer v. Thomas, 63 Tex. 30 S. W. 1114.

§ 104. — Further of the Community Property.

Where the husband or wife becomes insane, having no child or children, and no separate property, the common property passes to the sane spouse, charged with the debts of the community, and no guardianship of the estate of such insane husband or wife is necessary.³³ The sane spouse, whether husband or wife, may alienate the community freely, subject only to the rights of creditors, for there is no one to complain. There being no children, the estate belongs to him or her. This amendment is since the decision of *Heidenheimer v. Thomas*, 63 Tex. 287, and to some extent supersedes the rule there announced. However, the rule as there stated, will still govern where an administration of the community is authorized. From analogy, if the husband or wife becomes insane, the sane spouse would have the right to convey, without any species of administration, the community for the purpose of paying debts or relieving charges against it, the same as in case of death. But where it is desired to go further, and administration is authorized under the statute, resort would be necessary to that procedure. For a community administration is now authorized in cases of insanity, as of death.³⁴

§ 105. — When Husband has Deserted Her.

It is in cases where the husband has deserted the wife, or they are otherwise permanently separated, that the wife's right to convey without his joining her is most frequently exercised. When so abandoned or separated, her right, hitherto passive, becomes at once active, and she is invested with all the powers of control, management, and disposition of her property.³⁵ And as it affects her right to convey her separate property as a *feme sole*, it makes no difference whether the separation be brought about by the husband's abandoning the wife, or *vice versa*, so

³³Rev. Stat. art. 2220.

³⁴See *Community Administration*, post, § 375.

³⁵*Wright v. Hays*, 10 Tex. 130; *Rutler v. Robertson*, 11 Tex. 142; *Blanchet v. Dugat*, 5 Tex. 507; *Cheek v. Bellows*, 17 Tex. 613; *Wright v.*

Blackwood, 57 Tex. 644; *Walker v. Stringfellow*, 30 Tex. 570; *Carothers v. McNese*, 43 Tex. 221; *Clements v. Ewing*, 71 Tex. 370, 9 S. W. 312; *Therriault v. Compere* (Tex. Civ. App.) 47 S. W. 750.

the separation is permanent and not temporary in its character.³⁶ Even though the property be the homestead, it may be thus conveyed by her.³⁷

And we may here add that her power of disposition under such circumstances is not confined to her separate property, for certainly to the extent that it was the duty of the husband to support the family, she has taken his place, and when for such a purpose it becomes necessary to charge³⁸ or convey the community property, she may do so.³⁹ The sentence of a man to the penitentiary, and his confinement there, are equivalent to an abandonment of his wife;⁴⁰ but mere absence not amounting to a permanent separation will not confer such powers upon her.⁴¹ Her power to convey when abandoned is equal to her power to contract as a *feme sole* under such circumstances.⁴²

§ 106. — Her Deeds for Certain Corporation Purposes.

Another class of conveyances which may be executed by a married woman, and which will be binding upon her, the same as if she were a male, notwithstanding the husband does not consent nor join in the same, and although she may not be privately examined separate and apart from him, is her contracts and deeds for corporation purposes, in such corporations as we have seen that she may be a subscriber and stockholder in.⁴³

§ 107. The Privy Examination.

A married woman cannot convey title to her lands except by deed executed upon her private examination, made as the law directs. Her signature, and any other acknowledgment with-

³⁶Davis v. Saladee, 57 Tex. 326; Bennett v. Montgomery, 3 Tex. Civ. App. 222, 22 S. W. 115; Clark v. Wicker (Tex. Civ. App.) 30 S. W. 1114.

³⁷Hector v. Knox, 63 Tex. 613.

³⁸Fermier v. Brannan, 21 Tex. Civ. App. 543, 53 S. W. 699.

³⁹Cheek v. Bellows, 17 Tex. 613; Fullerton v. Doyle, 18 Tex. 3; Cullers v. James, 66 Tex. 494, 1 S. W. 314; Ann Berta Lodge No. 42, I. O.

O. F. v. Leverton, 42 Tex. 18; Zimpelman v. Robb, 53 Tex. 274; Heidenheimer v. Thomas, 63 Tex. 287; Queen Ins. Co. v. May (Tex. Civ. App.) 35 S. W. 829.

⁴⁰Slator v. Neal, 64 Tex. 222.

⁴¹Sorrel v. Clayton, 42 Tex. 188; Carothers v. McNese, 43 Tex. 221; Finks v. Thompson. 11 Tex. Civ. App. 538, 32 S. W. 711.

⁴²Ante, § 67.

⁴³Ante, § 77.

out such examination "privily and apart from her husband," is a nullity; no other act connected with her conveyance is of more importance to the vitalizing of it than is this examination. It is absolutely essential to its validity, for "no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband," saith the statute, and to the same tenor has been the uniform holding of the courts.⁴⁴ The statute contemplates that the husband shall not be present at the time the instrument is shown to the wife and explained to her by the officer. He should not be in such proximity as to be able, with the wife's knowledge, to overhear the explanations and her responses to the officer's interrogatories, or in any other manner exercise a possible influence over her by his presence or nearness. An instrument not explained to her by the officer at the time of the privy examination is not properly acknowledged;⁴⁵ but where such instrument, complete within itself, is fully explained, the officer is under no obligation to further explain a different instrument entered into between the husband and the grantee relative to a reconveyance of the property.⁴⁶ Before the officer is authorized to certify the acknowledgment, the married woman must have appeared before him for the purpose of acknowledging such instrument. If she did not appear before him at all his certificate that she did, although in strict compliance with the statute in matter of form, will not make valid the deed, even as to innocent purchasers.⁴⁷

But it is intimated in *Hussey v. Moser*, 70 Tex. 42, 7 S. W. 606, that if the wife authorizes another to appear and acknowledge for her, such act will estop her as against an innocent purchaser; if her appearance before him was for another purpose, he cannot, because she incidentally admitted the execution,

"*Berry v. Donley*, 26 Tex. 737; *Cross v. Everts*, 28 Tex. 523; *Baily v. Trammell*, 27 Tex. 328; *Cravens v. Booth*, 8 Tex. 243; *Young v. Van Benthuyzen*, 30 Tex. 762; *Hampshire v. Floyd*, 39 Tex. 103; *Fitzgerald v. Turner*, 43 Tex. 79; *Coffey v. Hendricks*, 66 Tex. 676, 2 S. W. 47; *Wilson v. Simpson*, 68 Tex. 306, 4 S. W. 839; *Groesbeck v. Bodman*, 73

Tex. 287, 11 S. W. 322; *Parker v. Chancellor*, 73 Tex. 475, 11 S. W. 503.

⁴⁴*Norton v. Davis*, 83 Tex. 32, 18 S. W. 430.

⁴⁵*Andrews v. Bonham*, 19 Tex. Civ. App. 179, 46 S. W. 902.

⁴⁷*Wheelock v. Cavitt*, 91 Tex. 679, 45 S. W. 796.

where it was not her purpose to then and there acknowledge the deed, embody such admission in a certificate to such deed.⁴⁸ Equity will not aid a deed not separately acknowledged.⁴⁹ Nor will the affidavit of a subscribing witness, made for the purpose of registration, cure the omission,⁵⁰ for this would be to disregard altogether the necessity for a separate acknowledgment by a married woman as prescribed by law.

§ 108. Certificate of Officer.

Scarcely less important than the separate examination and acknowledgment, is the certificate of the officer taking the married woman's acknowledgment to her deed; for it is the evidence of the examination, and ought to be a true history of what was done. It should be complete,—that is, show that all the law requires to be done was done, for it is then sufficient whether it employs the identical words prescribed by law or not, as a substantial compliance is all that is necessary.⁵¹ The essential features of every certificate are: (1) It should appear by the marginal venue that the officer acted within his jurisdiction; (2) that the grantor appeared before the officer; (3) that such grantor was known or made known to the officer; (4) that she was examined privily and apart from her husband; (5) and had the instrument fully explained to her; (6) and that she thereupon acknowledged such instrument to be her act and deed, and that she had willingly signed the same for the purposes and consideration therein expressed; and (7) that she did not wish to retract it. The certificate should then be signed and sealed by the officer. Unless these requisites appear, at least substantially,⁵² the instrument is invalid, and passes no title, either legal or equitable. As a deed the instrument is void, where the certificate fails to show that the law has been complied with.⁵³

⁴⁸Breitling v. Chester, 88 Tex. 589, 32 S. W. 527.

⁴⁹Callahan v. Patterson, 4 Tex. 61.

⁵⁰Nichols v. Gordon, 25 Tex. Supp. 109.

⁵¹Solyer v. Romanet, 52 Tex. 562; Coombes v. Thomas, 57 Tex. 321; Belcher v. Weaver, 46 Tex. 294.

⁵²Clark v. Groce, 16 Tex. Civ. App.

453, 41 S. W. 668; McDannell v. Horrell, 1 Posey, Unrep. Cas. (Tex.) 521; Watkins v. Hall, 57 Tex. 1.

⁵³Davis v. Agnew, 67 Tex. 206, 2 S. W. 43, 376; Jones v. Robbins, 74 Tex. 615, 12 S. W. 824; Johnson v. Bryan, 62 Tex. 623; Langton v. Marshall, 59 Tex. 296; Ruleman v. Pritchett, 56 Tex. 482.

An examination of some of the cases bearing upon the essential features of the certificate as above set out will not be amiss. Where it does not appear from the certificate that the grantor was known or made known to the officer the instrument is fatally defective;⁵⁴ or where it does not appear that the instrument was shown and fully explained to her;⁵⁵ but it is not imperative that the certificate should show that the officer made the exhibit and explanation to her.⁵⁶ It must show that she was examined separate and apart from her husband;⁵⁷ and that she acknowledged that she had willingly signed the same;⁵⁸ but to state that the grantor "assigned" the deed, instead of "signed," is a substantial compliance,⁵⁹ as it is to state that she "freely and voluntarily, with the fear or compulsion on the part of her said husband, signed," when it is apparent that "without" was intended instead of "with;"⁶⁰ nor is the omission of the word "her" in the connection that she "acknowledged such instrument to be her act and deed" material.⁶¹ It is material, however, that the certificate should show that the grantor declared to the officer that she did not wish to retract it;⁶² but a statement that "she still voluntarily assents thereto" is sufficient,⁶³ and the omission of the word "it" after retract will not vitiate it.⁶⁴ It is

⁵⁴Hayden v. Moffatt, 74 Tex. 647, 12 S. W. 820; McKie v. Anderson, 78 Tex. 207, 14 S. W. 576; Frost v. Erath Cattle Co. 81 Tex. 505, 17 S. W. 52; Beitel v. Wagner, 11 Tex. Civ. App. 365, 32 S. W. 366; Hurst v. Finley, 22 Tex. Civ. App. 605, 55 S. W. 388; Watkins v. Hall, 57 Tex. 1.

⁵⁵Johnson v. Bryan, 62 Tex. 623; Burkett v. Scarborough, 59 Tex. 495; Langton v. Marshall, 59 Tex. 296; McKinney v. Matthews (Tex.) 6 S. W. 793; Norton v. Davis, 83 Tex. 32, 18 S. W. 430; Moores v. Linney, 2 Tex. Civ. App. 293, 21 S. W. 709; Runge v. Sabin (Tex. Civ. App.) 30 S. W. 568.

⁵⁶Breneman v. Mayer (Tex. Civ. App.) 58 S. W. 725.

⁵⁷Rice v. Peacock, 37 Tex. 392;

Williams v. Ellingsworth, 75 Tex. 480, 12 S. W. 746.

⁵⁸Hayden v. Moffatt, 74 Tex. 647, 12 S. W. 820.

⁵⁹Broussard v. Dull, 3 Tex. Civ. App. 59, 21 S. W. 937.

⁶⁰Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388; Johnson v. Thompson (Tex. Civ. App.) 50 S. W. 1055.

⁶¹Gray v. Kauffman, 82 Tex. 65, 17 S. W. 513.

⁶²Ruleman v. Pritchett, 56 Tex. 482; Davis v. Agnew, 67 Tex. 206, 2 S. W. 43, 376; Murphy v. Reynaud, 2 Tex. Civ. App. 470, 21 S. W. 991; Freeman v. Preston (Tex. Civ. App.) 29 S. W. 495.

⁶³Norton v. Davis, 83 Tex. 32, 18 S. W. 430.

⁶⁴Montgomery v. Hornberger, 16 Tex. Civ. App. 28, 40 S. W. 628.

also sufficient in this respect if she declares in the certificate that "she wishes not to retract her act."⁶⁵ So, too, a recitation that "she acknowledges it to be her own free act and deed, and that she wishes not to retract it," is tantamount to saying that she willingly signed the same and wished not to retract it.⁶⁶

The omission of the words "sealed and delivered" from the early form prescribed for the certificate did not vitiate the acknowledgment,⁶⁷ nor the use of the words "with constraint" for "without constraint," such being a clerical misprision.⁶⁸ The parenthetical clause contained in the form prescribed by law, when not stricken from the certificate, will be treated as surplusage,⁶⁹ and the omission of the wife's Christian name is immaterial.^{69'} If the deed have no certificate of separate acknowledgment,⁷⁰ or an insufficient one, it passes no title, and cannot be aided by showing that the married woman really signed and voluntarily assented to the deed.⁷¹ If proof of an acknowledgment of a married woman becomes necessary,—as where the original deed is lost,—it may be supplied according to the rules of evidence: but full proof of the essentials of such examination and acknowledgment must be made, as it should appear in the certificate.⁷² The act does not apply to widows.⁷³ If the deed be properly acknowledged and certified as to the wife, it is entitled to record, although defective as to the husband.⁷⁴

§ 109. — Seal.

It is important that the acknowledgment, when properly taken, should also be properly certified. The seal of the officer

⁶⁵Thompson v. Johnson, 84 Tex. 548, 19 S. W. 784.

⁶⁶Wilson v. Simpson, 80 Tex. 279, 16 S. W. 40.

⁶⁷Mullins v. Weaver, 57 Tex. 5.

⁶⁸Johnson v. Thompson (Tex. Civ. App.) 50 S. W. 1055.

⁶⁹Farrell v. Palestine Loan Asso. (Tex. Civ. App.) 30 S. W. 814; Adams v. Pardue (Tex. Civ. App.) 36 S. W. 1015.

^{69'}Noel v. Clark (Tex. Civ. App.) 60 S. W. 356.

⁷⁰Looney v. Adamson, 48 Tex. 619.

⁷¹Stone v. Sledge (Tex. Civ. App.) 24 S. W. 697.

⁷²Simpson v. Edens, 14 Tex. Civ. App. 235, 38 S. W. 474; and authorities cited.

⁷³Beville v. Jones, 74 Tex. 148, 11 S. W. 1128.

⁷⁴Rork v. Shields, 16 Tex. Civ. App. 640, 42 S. W. 1032.

is one of the elements of the certificate, and may not be omitted.⁷⁵ And should the seal be omitted from such certificate, the wife's deed is of no effect, until it is in some way supplied.⁷⁶ This might be done while the officer is yet in office, possibly, or by suit as shown in the next succeeding section; but if the seal be attempted to be supplied after the wife's original acknowledgment it can only be done where she is still willing to be bound.⁷⁷ A deed not properly acknowledged and properly certified under the officer's seal is not entitled to registration; and, if actually recorded, is not notice to one who makes improvements upon the land embraced, in good faith.⁷⁸ But where the officer declares in his certificate that he has affixed the proper seal, it will be presumed that he did, although the characters ordinarily employed to designate its place are not used;⁷⁹ but this probably applies to copies of such deeds and records thereof,⁸⁰ as, if the original were tendered, an objection that it contained no seal would be good, and it would not be a case for presumptions. While the law requires the officer to certify under his hand and seal, it is not necessary that he should state that he has affixed his seal if he has really done so, for the impression speaks for itself.⁸¹

§ 110. Defective Certificate; Correction.

The statutes⁸² provide that, "when the acknowledgment or proof of the execution of any instrument in writing may be properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate." This statute is broad in its terms, and applies to deeds and other instruments of writing properly acknowledged by married women, but defectively certified, as to like instruments executed by other persons. Married women

⁷⁵Rev. Stat. art. 3509.

⁷⁶McKellar v. Peck, 39 Tex. 381, S. C. 2 Posey, Unrep. Cas. (Tex.) 192, and authorities cited; Kincaid v. Jones, 2 Posey, Unrep. Cas. (Tex.) 534.

⁷⁷Ibid.

⁷⁸Daugherty v. Yates, 13 Tex. Civ. App. 646, 35 S. W. 937.

⁷⁹Coffey v. Hendricks, 66 Tex. 676, 2 S. W. 47.

⁸⁰Ballard v. Perry, 28 Tex. 347; Witt v. Harlan, 66 Tex. 660, 2 S. W. 41.

⁸¹Nichols v. Stewart, 15 Tex. 226.

⁸²Art. 4663.

are not excepted from its operations.⁸³ Parol testimony is inadmissible to correct a defectively certified acknowledgment,⁸⁴ save where the act of the statute is invoked within proper time by appropriate pleadings. In *Looney v. B. & L. Assn. v. Goforth* Tex. 59 S. W. 871, where the validity of a deed of trust upon the homestead depended upon the validity of a prior mechanic's lien contract which had been regularly acknowledged by the wife, but defectively certified by the officer taking her acknowledgment, the court held parol testimony inadmissible to show such acknowledgment regular, and such contract therefore valid. This wholesome relief ought never to have been denied, even in the absence of a statute, for it is not the officer's certificate that gives force to the wife's acknowledgment, but the full compliance with the law in the matter of examining her and taking her acknowledgment. The certificate is the act of the officer with which she can have no concern, and which does not in the least affect her in the free and voluntary consummation of her contract. It is the mere furnishing in lasting form the evidence of her proper acknowledgment. The statute authorizing suit was not intended to give rights where none existed, or to make valid invalid acknowledgments. It simply supplies another means of proving that in fact a proper acknowledgment was had. The court, after a judicial examination into the matter of whether or not there was a statutory acknowledgment, substitutes its judgment for the officer's certificate as the evidence of such fact. It has precisely the same force as though the original certificate had been complete. The remedy is barred by four years.⁸⁵

Independently of the statute, it is held that the officer, if he be still in office, has the right to correct his errors in failing to properly certify his steps in such matters at any time the necessity may arise.⁸⁶ But the writer believes the better reason to be with the view as held by the court of civil appeals upon the decision of the same case cited,⁸⁷ that the statutory remedy must

⁸³Johnson v. Taylor, 60 Tex. 360.

⁸⁴Stone v. Sledge, 87 Tex. 49, 26 S. W. 1068.

⁸⁵Looney v. Adamson, 48 Tex. 619; McKellar v. Peck, 2 Posey, Unrep. Cas. (Tex.) 192.

⁸⁶Stone v. Sledge (Tex. Civ. App.) 24 S. W. 697.

⁸⁷Norton v. Davis, 83 Tex. 32, 18 S. W. 430.

be pursued, and that the officer has lost all control over the instrument, and consequently his power to make corrections, after the same passes out of his hands. The supreme court admits that the weight of authority supports this view, but bases its opinion upon *McKellar v. Peck*, 39 Tex. 381; but an examination of that authority shows that the court limited the right of such officer to make the correction to those instances only where the grantor "had not in the meantime withdrawn her acknowledgment, but under no other circumstances." This is a new acknowledgment, and might or might not relate back to the original date, according as other persons' rights had or had not intervened. If the officer can change his certificate for one purpose he may for another, and accordingly might invalidate an instrument once good upon its face. Such power ought not to be accorded him. The law has provided a means of inquiring into such matters, where all persons to be affected may be heard, and it is more in keeping with the conclusive character of official acts, and with a spirit of fairness toward all concerned, that this remedy be pursued. A deed of trust duly signed and acknowledged by the husband and wife, upon the homestead, cannot have the effect of correcting a defectively acknowledged lien, where such was not the object and purpose of the new instrument.⁸⁸

§ 111. Who Authorized to Take; Disqualification.

The acknowledgment or proof of an instrument of writing for record may be made within the state before any of the following officers: A clerk of the district court, judge or clerk of the county court, or a notary public; without the state, but within the United States, before a clerk of some court of record having a seal, a commissioner of deeds appointed under the laws of this state, or a notary public; without the United States, before a minister, commissioner, or *charge d'affaires* of the United States, resident and accredited in the country where the proof or acknowledgment is made, a consul-general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul or

⁸⁸*Starnes v. Beitel*, 20 Tex. Civ. App. 524, 50 S. W. 202.

consular agent of the United States, resident in the country where the proof or acknowledgment is made, or a notary public.⁸⁹

It is immaterial whether the officer acting is regularly such officer or not; it is sufficient that he is such officer *de facto*.⁹⁰ An officer interested in the subject of the conveyance, whether for himself or as agent of another, is disqualified to take the acknowledgment.⁹¹ Thus, a managing agent of a building association, who is a stockholder and receives a percentage of the earnings as compensation, is disqualified to act as notary public in taking an acknowledgment of a mortgage to the association.⁹²

§ 112. Defective Deeds; Rights of Innocent Persons.

A deed or other instrument required to be acknowledged may be defective for want of a proper acknowledgment, yet apparently good because correctly certified; or it may be invalid because of a defective certificate, when in truth the requirements of the law as to acknowledgment have been fully complied with. Absolute verity is accorded the statements contained in the officer's certificate. The law presumes that he did just what he there says he did, and no more. Whether his statements are true or not true, the world has a right to rely upon them, where their falsity is not known. So that, if a married woman appears before an officer for the purpose of acknowledging her deed, the act of the officer may be never so irregular and deficient, yet, if he affixes to the instrument a certificate regular in every respect, his certificate is conclusive upon her in favor of an innocent vendee who pays value for the property, without notice that the officer

⁸⁹Rev. Stat. arts. 4613-4615.

⁹⁰Thompson v. Johnson, 84 Tex. 548, 19 S. W. 784.

⁹¹Sample v. Irwin, 45 Tex. 567; Kutch v. Holley, 77 Tex. 220, 14 S. W. 32.

⁹²Miles v. Kelley, 16 Tex. Civ.

App. 147, 40 S. W. 599; Bexar Bldg. & L. Asso. v. Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583; Workman's Mut. Aid Asso. v. Monroe (Tex. Civ. App.) 53 S. W. 1029.

has failed to perform his duty.⁹³ We have already seen, however, that before the officer's certificate will have this force his power must have been invoked by the grantor's appearing before him for the purpose of making such acknowledgment;⁹⁴ for, until this is done, his act would be nothing less than a forgery which could never bind the pretended grantor nor anyone else. Such deed, properly certified, is entitled to registration, and carries full notice with it as other valid deeds, except where its vice is known. The remedy is by an action to cancel the conveyance. As to the second class of instruments mentioned, they are upon their face invalid, hence their registration carries no notice to anyone of the rights of those claiming under them, nor will they constitute title or color of title so as to support the plea of limitations.⁹⁵ However, such a deed may form the basis for a claim for improvements made in good faith.⁹⁶ It is the validity of the certificate that entitles the instrument to registration, and where there is no notice by reason of the recording of a defectively certified instrument, a correction of the certificate by suit or otherwise will not have a retroactive effect.⁹⁷

Article 637 of the Revised Statutes providing that instruments in writing intended as conveyances of land, which are invalid as such conveyances, shall nevertheless be effectual as contracts upon which conveyances may be enforced, has no application to the deeds of married women.

§ 113. Avoiding Conveyance; How and When.

If for any reason a married woman's deed is void upon its face, it has no binding force upon her or those claiming under her, and may by any of them be disregarded at will, and the property recovered, or reconveyed to another. A deed to her

⁹³Pool v. Chase, 46 Tex. 207; Kourouk v. Marak, 54 Tex. 201; Waltee v. Weaver, 57 Tex. 569; Beattie v. Keller (Tex. Civ. App.) 49 S. W. 408; Solyer v. Romanet, 52 Tex. 562; Hurst v. Finley (Tex. Civ. App.) 54 S. W. 1072; Forbes v. Thomas (Tex. Civ. App.) 51 S. W. 1097; McDannell v. Horrell, 1 Posey, Unrep. Cas. (Tex.) 521.

⁹⁴Ante, § 107.

⁹⁵Berry v. Donley, 26 Tex. 737; Rhine v. Hodge, 1 Tex. Civ. App. 368, 21 S. W. 140.

⁹⁶Ibid.; Hill v. Spear, 48 Tex. 583; Elam v. Parkhill, 60 Tex. 581; Dorn v. Dunham, 24 Tex. 367; Johnson v. Bryan, 62 Tex. 623.

⁹⁷Johnson v. Taylor, 60 Tex. 360; Davis v. Agnew, 67 Tex. 206, 2 S. W. 43, 376; Hayden v. Moffatt, 74 Tex. 647, 12 S. W. 820.

property not signed, or, if signed, not properly acknowledged and certified, passes no title to her property, and she may disregard it. Many instruments apparently valid, as shown in the preceding section, may nevertheless be avoided by her for latent defects. The most common of these is the failure of the officer taking her acknowledgment to properly discharge his duties. It is fatal, and, being properly alleged and proved, entitles her to an avoidance of the deed, where the rights of innocent third persons have not intervened. It has always been the law, however, that the notary's certificate was conclusive upon her where the rights of others were jeopardized, unless she could show that there was a fraudulent combination between the officer and such persons, or that they had notice of the defects in the conveyance.⁹⁸ It would be a greater injustice to take from one who, guiltless of all attempt to wrong or defraud her, has purchased and paid for her property, than to refuse to restore it to her when she has voluntarily attempted to sell it, but because of the officer's mistake her deed is not binding.⁹⁹ But if the conveyance be one of gift,¹⁰⁰ or no value has been paid, the deed in law being insufficient, she may recover. The decision in *Hartley v. Frosh*, 6 Tex. 208, and an intimation in *Freiberg v. Delamar*, 7 Tex. Civ. App. 263, 27 S. W. 151, based thereupon, however, declare a different rule. It is there said that the certificate, being in conformity with the statute, may not be impeached merely by saying that she was not examined privily and apart from her husband, and that the application of that rule was not dependent upon the question whether or not the beneficiary was technically an innocent purchaser; that that question becomes important only when fraud or undue influence is established by the wife. If this be the correct rule, it certainly goes very far toward ignoring the statute which declares that "no such conveyance shall take effect until the same shall have been acknowl-

⁹⁸*Hartley v. Frosh*, 6 Tex. 208; *Shelby v. Burtis*, 18 Tex. 644; *Wiley v. Prince*, 21 Tex. 637; *Williams v. Pouns*, 48 Tex. 141; *Pool v. Chase*, 46 Tex. 207; *Kocourek v. Marak*, 54 Tex. 201; *Davis v. Kennedy*, 58 Tex. 516; *Hurt v. Cooper*, 63 Tex. 362; *Pierce v. Fort*, 60 Tex. 464; *Brew-*

ster v. Davis, 56 Tex. 478; *Coker v. Roberts*, 71 Tex. 597, 9 S. W. 665; *Gray v. Shelby*, 83 Tex. 405, 18 S. W. 809.

⁹⁹*McFalls v. Brown* (Tex. Civ. App.) 37 S. W. 784.

¹⁰⁰*Riley v. Wilson*, 86 Tex. 240, 24 S. W. 394.

edged by her privily and apart from her husband," and places it within the power of the notary to completely disregard the law, and to substitute his statements in the certificate for the duties required of him in taking such acknowledgments; thus making the wife's deeds effective when the statute says they shall not be. The language above quoted was not contained in the acts of 1841 nor 1846, under one of which *Hartley v. Frosh* was decided. It is the policy of our law to regard the certificate as correct until inquired into by a proceeding directly for that purpose. Witness the statute authorizing a suit to correct when it fails to speak the truth. Should not such suit be permitted when it speaks a falsehood?¹

§ 114. — for Fraud and Duress.

As an illustration of the character of duress against which a married woman may have relief, the case of *Wiley v. Prince*, 21 Tex. 637, is apt. 'The husband was desirous of having his wife join him in a mortgage upon her separate property to secure some of his debts. He importuned her most grievously, and urged that it would enable him to maintain his credit, purchase more goods, and continue his business; upon her refusal, he became violent, threatened to burn down the house and carry off her children. The agent of the creditor likewise importuned her with similar results. She at last yielded and executed the mortgage in due form. The court affirmed the judgment below canceling the mortgage, finding that the agent of the creditor had full notice of the fraud, and intimated that it would have done so upon a lack of such notice, since no consideration passed. The court further said that the rules in relation to duress as against strangers apply with redoubled force with relation to a wife. In fact acts and circumstances which would not relieve a stranger from his act would be duress as regards the wife. There is good reason why this should be the rule. The wife, unaccustomed to dealing with her property, and unskilled in the art of trading, is too frequently at the mercy of designing men, who, with importunate persistence, misrepresentations, and

¹*Caffey v. Caffey*, 12 Tex. Civ. App. 616, 35 S. W. 738; *Prince*, 21 Tex. 637; *Webb v. Burney*, 70 Tex. 322, 7 S. W. 841.

fraud, seek to obtain from her a conveyance of her property which is anything else but her free and willing act. The threat by the husband, to entitle her to relief, need not be of physical or personal violence. A threat to abandon her has been held sufficient.² Husband and wife do not deal at arm's length, and for this reason, the husband, where he wills, has every opportunity of coercing her and otherwise perpetrating a fraud upon her rights. Where he misrepresents the nature of the conveyance, or its effect, or the material consideration, and she signs upon such misrepresentations, the notary failing to fully explain the instrument, she may avoid it. As where the deed called for a certain consideration, and the husband fraudulently delivered it to a person having knowledge of such fraud, for a less consideration;³ or where a deed properly executed and turned over by her to her husband is by him, in violation of her instructions, delivered to one having notice of his lack of authority to deliver.⁴ But upon the plainest principles of justice, before the wife can have relief from the fraudulent acts of her husband, she must carry home to the parties to be affected a knowledge of such conduct.⁵ One purchasing property in which the wife has an interest may deal with the husband, and when presented with a conveyance sufficient in law, and regularly executed by the wife, he has a right to believe that her consent was fully and freely given, upon a full knowledge of the contents of the instrument, and is not affected by the fraud of the husband in procuring the acknowledgment or execution by the wife, of which he had no notice.⁶ One cannot presume that the husband will perpetrate a fraud upon his wife,⁷ yet when the consideration of her conveyance is so grossly inadequate and unreasonable as to excite suspicion of unfairness and undue influence, or of her want of willingness to execute, the purchaser would be put upon inquiry as to the existence of such fraud or undue influence, or of the truth of the certificate of her separate examination and acknowledgment,

²Kocourek v. Marak, 54 Tex. 201.

³Cole v. Bammel, 62 Tex. 108.

⁴Edwards v. Dismukes, 53 Tex. 605.

⁵Pool v. Chase, 46 Tex. 207.

⁶McDannell v. Horrell, 1 Posey, Unrep. Cas. (Tex.) 521.

⁷Pierce v. Fort, 60 Tex. 464; Edwards v. Dismukes, 53 Tex. 605.

and she would be permitted to prove such fraud or influence, or dispute the statements of such certificate.⁸

§ 115. Subjects of Her Conveyance; Separate Property.

We have seen that the husband cannot convey the wife's property, so that whatever disposition is made of it must be by her, subject to the limitations and requirements shown in this chapter. The rules here laid down have no application to the husband's property, nor to a conveyance thereof by the wife; for if she conveys his property for him, which he may authorize her to do,⁹ she does so as his agent, and is not bound by the rules of conveyances of married women. For these apply only to "real estate the separate property of the wife," and to the "homestead," whether separate or not. So her conveyance of her husband's property may be executed as a *feme sole*. She need not join in the conveyance by the husband of his separate property,¹⁰ unless it be the homestead, nor in the conveyance of the community, not the homestead.

§ 116. — Community Property.

We now come to consider under what circumstances the wife may convey the community property of herself and husband. The statutes provide that the community property during coverture may be disposed of by the husband alone. He is the active member of the marital partnership upon whom rests the burden of supporting the family, and for this, as well as reasons of convenience, the wife is not permitted to convey it. This language cannot be held to imply that the wife cannot under any circumstances dispose of the community. To give to the language a literal interpretation it would deny the wife's power to sell, even with the husband's consent. We are not aware that any court has ever gone to that extent. It was intimated in an early case,¹¹ that the language meant probably no more than that the husband had the power to dispose of the community without the

⁸Webb v. Burney, 70 Tex. 322, 7 S. W. 841. See *post*, chap. IX.

Vineyard, 91 Tex. 488, 44 S. W. 485.

⁹Presnall v. McLeary (Tex. Civ. App.) 48 S. W. 1096.

App.) 50 S. W. 1066; O'Connor v. M. W.—8.

¹⁰Wright v. Barnett (Tex. Civ.

¹¹Thomas v. Chance, 11 Tex. 634.

joinder of the wife; that, although she had an equal interest in the property with him, yet her assent to its alienation was not necessary to its validity. But the language means that it means that the wife cannot dispose of the same, while the husband is in a position to exercise the functions of husband and head of the family. He has the exclusive right.¹² Yet the wife's conveyance of the community with his consent is perfectly valid and binding upon both.¹³ In *Fox v. Brady*, 1 Tex. Civ. App. 590, 20 S. W. 1024, the community property was conveyed which had been deeded to the wife, who subsequently executed a deed and acknowledged the same before her husband as officer. The husband did not join in the deed. The court on appeal held that her deed, if made with her husband's consent, would pass the title, but, says Stephens, Justice, the trial court "should have left it to the jury to infer the consent of the husband from the facts and circumstances introduced in evidence and not have instructed them, in effect, that the facts from which they might infer such consent amounted, as a matter of fact, to consent." But ordinarily it may be said that the husband, during coverture, has absolute dominion over the community property; he may sell it without the wife's consent if not done for the purpose of defrauding her.¹⁴ His sole deed conveys the community property and her signature adds no force to the instrument.¹⁵ It makes no difference that the community property stands in the name of the wife; his deed alone will convey it. She has acquired a different right in the property than if the title had originally been taken in the name of the husband.¹⁶ Her holding in this instance is for the community, and the law authorizes the husband alone to convey the community.

¹²*Moody v. Smoot*, 78 Tex. 119, 14 S. W. 285; *Green v. Ferguson*, 62 Tex. 525; *Young v. Van Benthuyssen*, 30 Tex. 762.

¹³*Thomas v. Chance*, 11 Tex. 634; *Berry v. Wright*, 14 Tex. 270; *Fox v. Brady*, 1 Tex. Civ. App. 590, 20 S. W. 1024.

¹⁴*Scott v. Maynard, Dallam* (Tex.) 548.

¹⁵*Purdom v. Boyd*, 82 Tex. 606.

¹⁶*Scott v. Maynard, Dallam* 548; *Huston v. Curl*, 8 Tex. 548; *Wright v. Hays*, 10 Tex. 130; *Winters v. Jewett*, 28 Tex. 192; *Wright v. Wall*, 23 Tex. 585; *Berry v. Wright*, 14 Tex. 270.

But there may exist facts which authorize the wife to sell the community. Where she has been forced by the abandonment of her husband to assume the duties of head of the family she may sell it.¹⁷ And where the husband is insane, and there are no children, administration not being required, she may convey the community.¹⁸ But in such case, if administration be authorized, she cannot; nor probably where the husband is incapacitated by reason of nonage, as he might then have a guardian, as when he is an habitual drunkard. But in all cases where she may under the law convey the community, she does so upon the theory that while she has a husband *de jure*, he is not one *de facto*, and she may execute as a *feme sole*. Whether she executes under these circumstances, or jointly with him, or as his agent, the statutes of conveyances of married women have no application.¹⁹ If she joins the husband in a conveyance of property supposed to be her separate property, which nevertheless turns out to be community, the conveyance is good,²⁰ although she may not acknowledge the same.²¹

§ 117. — the Homestead.

Since the act of April 30, 1846, a conveyance of the homestead has been required to be signed and acknowledged by the wife as in the case of her separate property. The same strictness is required in each case. There must be the separate examination, explanation, and acknowledgment.²² She is required to join in the conveyance under all circumstances so far as ownership is concerned; that is, whether the same be separate property of either of the spouses or belong to the community. Notwithstanding the fee be in the husband he is forbidden to sell except upon her joining him, and his efforts to do so are a nullity, and convey no interest whatever.²³ The wife can no more convey the homestead unrestrictedly than can the husband if the

¹⁷*Ante*, § 105.

¹⁸*Ante*, § 104.

¹⁹*Maxson v. Jennings*, 19 Tex. Civ. App. 700, 48 S. W. 781.

²⁰*Avery v. Popper* (Tex. Civ. App.) 45 S. W. 951; *Hayden Saddlery Hardware Co. v. Ramsay*, 14

Tex. Civ. App. 185, 36 S. W. 595.

²¹*Stephens v. Matthews*, 69 Tex. 341, 6 S. W. 567.

²²*Ante*, § 97; *Langton v. Marshall*, 59 Tex. 296; *post*, § 258.

²³*Whetstone v. Coffey*, 48 Tex. 269.

fee be in her. The effect of the statute is such that a conveyance in each instance is precisely the same. Both must join and both acknowledge in the manner pointed out for her acknowledgments to conveyances of her separate property.²⁴ The law applies to the business as well as the residence homestead. When no longer used as a homestead, the husband may convey, it not being the wife's separate property, without her acknowledgment.²⁵ So may the husband sell without the wife's joinder, where necessary to adjust existing liens and equities.²⁶ But this is a power which must be exercised in the utmost good faith and not with a fraudulent intent to deprive the wife of her homestead. Where this intent was shown his acts would be of no avail,—at least to those having notice of such design.²⁷

Where the homestead was upon the wife's separate land, and the husband without just cause abandoned her, she conveyed by her own deed and passed a good title.²⁸ And *vice versa*, if the wife desert her husband and abandon the homestead he may convey without her joinder, if the fee be his or the community's.

That the wife is temporarily living away from the homestead, does not authorize the husband, who continues to occupy it, to convey it without her joinder; nor will such a sale be upheld upon the principle of adjusting equities from the mere fact that there existed an encumbrance against the land which the purchaser assumed.^{28'}

§ 118. — Her Personal Property.

The various acts prior to the revision of 1879 required the wife's written conveyance of personal property to be separately acknowledged and certified, as of slaves and land. The courts in construing the act, held it to apply to the most insignificant

²⁴Smith v. Elliott, 39 Tex. 201.

²⁵Dickson v. Allen (Tex. Civ. App.) 24 S. W. 661; Willis v. Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715.

²⁶McCarty v. Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997; Morris v. Geisecke, 60 Tex. 633; Farmer v. Simpson, 6 Tex. 304; Meyer v. Claus,

15 Tex. 516; White v. Shepperd, 10 Tex. 163; Clements v. Lacy, 51 Tex. 150; Gillum v. Collier, 53 Tex. 592; Hicks v. Morris, 57 Tex. 658; De Bruhl v. Maas, 54 Tex. 464.

²⁷See *post*, § 259.

²⁸Hector v. Knox, 63 Tex. 613.

^{28'}Gibbons v. Hall (Tex. Civ. App.) 59 S. W. 814.

article of personal property.²⁹ Whether the language of the acts referred to could properly be interpreted to render void any attempt to convey the wife's personal property, not in writing and separately acknowledged, may well be doubted. Those acts did not declare any other mode of conveyance void, nor that all conveyances of such property should be in writing; but only that when in writing they should be acknowledged as directed by law. By the statutes of fraud then in force the wife's conveyances of her lands and slaves would have to be in writing, and, being in writing, would, of course, be subject to the conveyance statutes regulating married women's acknowledgments. But there was no statute requiring the conveyance of her personal property to be in writing. In *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734, S. C. 17 S. W. 393, our present Chief Justice, after a careful examination of the earlier cases, concluded that those courts had proceeded upon a radical misconception of the terms of the statute (1846), and announced the more sensible rule that under that act the wife's conveyance of her personal property did not have to be in writing at all.³⁰ Prior to this the supreme court, through Judge Henry, had refused to assent to the doctrine that a married woman's conveyance of her personal property under the act in question was required to be in writing and separately acknowledged.³¹

Whatever may have been the effect of the statutes referred to in the particular of requiring a privily acknowledged written instrument of conveyance of the wife's personal property, such is not now the law, if it ever was. The statute expressly applies to land only. But under the present law, as under all other acts since our earliest, the wife cannot convey her personal property without the husband's consent.³² Its possession is given him during marriage that he may use it with its fruits and revenues for the support of the matrimony, and if he desires he may retain it for such purpose. His assent need not be in writing. It may be either express or implied. Or he may by

²⁹*Hollis v. Francois*, 5 Tex. 195; *Taylor v. Hall*, 20 Tex. 211; *Gregory v. Van Vleck*, 21 Tex. 40; *Nichols v. Gordon*, 25 Tex. Supp. 109; *Tucker v. Carr*, 39 Tex. 98.

³⁰*McDaniel v. Garrett*, 11 Tex. Civ. App. 57, 31 S. W. 721.

³¹*Ikard v. Thompson*, 81 Tex. 285, 16 S. W. 1019.

³²*McCulloch v. Renn* 28 Tex. 793.

ratification or acquiescence adopt her unauthorized disposition of it. She may, if he consents, transfer her personal property, with or without a written conveyance; and if by written conveyance no separate examination and acknowledgment is necessary.³³

§ 119. Wife Signing Deed to Which She is Not a Party Grantor.

It requires the concurrence of all the essential parts of a deed to constitute a conveyance. The signature standing alone, even if accompanied by a proper certificate of her acknowledgment, will not make a conveyance. There must be apt words granting the estate. This has been the subject of adverse holdings in different states, but with us, in accordance with the weight of authority elsewhere, it is held that such instrument does not pass the title of the one signing. "A deed in the name of the husband alone may purport to convey property which in fact belongs to the wife in her separate right, but it purports to convey it as his own, and not as her, property. We think the instrument which was intended to be designated by the statute is a deed which, upon its face, purports to convey the wife's title to the property described, and that, in order to make it such, it must appear from the body of the conveyance itself, that the wife is a grantor therein," says Judge Gaines in *Stone v. Sledge*, 87 Tex. 49, 26 S. W. 1068. The wife's signing such deed to community property might evidence her assent to its disposition, but her assent is not necessary, and her signature and acknowledgment would add nothing to the instrument. The rule where the wife executed the instrument in her own name, and the husband signed and acknowledged only, might be different, for the reason that in that case the husband has no estate to convey; he is not a grantor, but his assent expressed in the statutory mode is all that is required. His signing, acknowledging, and delivery would evidence that assent.³⁴

³³*Bennett v. Virginia Ranch, Land & Cattle Co.* 1 Tex. Civ. App. 321, 21 S. W. 126; *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030; *Arnold v. Attaway* (Tex. Civ. App.) 35 S. W. 482, 89 Tex. 506, 35 S. W.

646; *Ragsdale v. Groos* (Tex. Civ. App.) 51 S. W. 256; *Wilkinson v. Rowland*, 3 Tex. App. Civ. Cas. (Willson) § 11.

³⁴*Ochoa v. Miller*, 59 Tex. 460.

§ 120. Special Instruments; Her Power of Attorney.

The statutes do not expressly authorize the wife to constitute another her agent for the conveyance of her property. But the statutes have not undertaken to deal with the class of instruments which she may make; this is left to the general law applicable to conveyances. It deals only with the mode of her executing these instruments. Unless forbidden by an express or implied rule of law she may execute any instrument concerning her property that a man could execute similarly situated. Her power of attorney is no exception. The instrument must be executed under the forms of the statute; there must be a joinder by the husband, and the privy examination and acknowledgment by the wife; this done, the agent may sell and make title.³⁵ Any property which she is authorized to convey may be thus disposed of, whether her separate property or the homestead.³⁶ Her death, of course, terminates the agent's authority to act, as does also the marriage of a woman who has previously given such power,³⁷ except, of course, in those cases where the power is coupled with an interest.³⁸ It is probably unnecessary to add that the agent's authority is controlled by the terms of the instrument empowering him.³⁹

§ 121. — Contracts to Sell and Title Bonds.

Certainly the wife's agreements, not in writing, to sell her property are not enforceable, unless possibly it be in those cases where the agreement was in consideration of one of the things for which she is authorized by law to contract an obligation; but if this is ever the case, it is only applicable to personal property, for her agreements to sell her realty must be, not only in writing, but separately acknowledged by her, as well as upon a joinder of her husband, in precisely the same manner as her conveyance of

³⁵Patton v. King, 26 Tex. 685;
Cannon v. Boutwell, 53 Tex. 626;
Warren v. Jones, 69 Tex. 462, 6 S.
W. 775.

³⁶Warren v. Jones, 69 Tex. 462, 6
S. W. 775; Jones v. Robbins, 74
Tex. 615, 12 S. W. 824.

³⁷Simpson v. Edens, 14 Tex. Civ.
App. 235, 38 S. W. 474.

³⁸Western U. Teleg. Co. v. Hearne
(Tex. Civ. App.) 40 S. W. 50.

³⁹Young v. Van Benthuyzen, 30
Tex. 762. See *ante*, § 41.

such property.⁴⁰ In speaking of the statute of conveyances of married women's property, in a case where a married woman's bond for title was under consideration,⁴¹ the court uses this language: "It was not intended to limit or restrict her in the exercise of the right or power of alienation to any character of conveyance or contract which she, in connection with her husband, might deem advantageous to be made with respect to her separate realty. If it was so intended it would certainly be inconsistent with the recognized general purpose underlying the law, to afford her, as far as practicable, the utmost freedom in its disposition. The statute does not attempt to define the character of conveyance or contract which would be necessary to transfer the title to the wife's separate property. Nor do we think that anything is contained in our law regulating conveyances that would indicate that the legislature contemplated that the legal effect of any instrument executed by the wife to transfer her property was to be changed or its status in any manner affected by the privy examination of the wife. That examination was necessary to its validity, to the extent of showing that she executed it voluntarily, etc. If she was free to act, and so declared herself, and that she wished not to retract it, the essential facts existed, which, if properly embodied in an official certificate of acknowledgment, would make valid and binding the instrument so acknowledged. But the instrument itself was to be determined by the well-settled principles applicable to conveyances of real property." While the title to her property will not leave her except upon an instrument properly acknowledged, here, as in the case of her power of attorney to convey, she has had her privy examination and opportunity to retract, and cannot avoid a specific enforcement of her contract thus solemnly entered into.

§ 122. — Further of the Homestead.

We will notice an attempted, and possibly real, distinction, between the wife's bond for title to her separate land, and to her homestead. It is only by judicial interpretation that the stat-

⁴⁰Cross v. Everts, 28 Tex. 523;
Green v. Chandler, 25 Tex. 148.

⁴¹Angier v. Coward, 79 Tex. 551,
15 S. W. 698.

utes regulating the manner of conveying real estate in which the wife has an interest have been made to include and authorize such instruments as mortgages, powers of attorney, and bonds for title; they are not expressly authorized, yet who can deny the wife's power to make them? Her right is everywhere recognized. Is the homestead an exception? In *Jones v. Goff*, 63 Tex. 248, the supreme court refused specific performance against a married woman of an executory contract, regularly acknowledged by her, for a conveyance of a part of the homestead, where she refused to convey according to her contract; the court saying that in such a case "the married woman consents, not to a conveyance, but a contract to convey. She joins, not in a conveyance, but an agreement to convey some time in the future. She does not declare that she wishes not to retract the conveyance, but that she wishes not to retract the agreement to convey. . . . Obviously that essential element in the conveyance of the homestead, *i. e.*, the right of the wife to retract, is wanting in an executory contract to convey; and where she refuses to carry out such contract, it is beyond the power of the court to supply that essential element;" and in course of the decision, also uses the following argument: "The sole and only mode prescribed by statute is by 'conveyance,' in which she joins the husband, and which she acknowledges privily and apart from him. To the word 'conveyance' as used in the statute must be assigned its ordinary signification; that is, a writing by which property is conveyed from one to another. As before remarked, the statute does not include agreements to convey, but conveyances only." Now there is not a single provision of the statute with regard to the mode of conveyance of the homestead that does not obtain with equal force in conveyances of the wife's separate real estate. In both instances a "joint conveyance" is required; as is also the wife's signature and privy examination. It has been often held that the wife's separate land, and even the homestead, may be conveyed by power of attorney, and that her separate land may be conveyed by her bond for title; yet the "statute does not include" these instruments. The language of *Jones v. Goff*, to the effect that the statute includes only "conveyances" signifying a writing by which one conveys title to an-

other, has been pointed out as *dictum* in a later case,⁴² and if literally true would exclude the well-recognized method of conveying by power of attorney, for this is not a conveyance of the homestead in the sense that the title passes from its owners until a conveyance by the agent. Is it true that, where the husband and wife jointly execute a bond for title for the conveyance of the homestead, and the same is duly signed and privily acknowledged by the wife, that the "essential element, *i. e.*, the right of the wife to retract, is wanting in such conveyance?" Such is the reasoning in *Jones v. Goff*. The method of conveying the homestead is identical with that of the wife's separate land, yet in the latter case the supreme court says that she may convey by title bond; that "her power and right to retract were exhausted in the execution of the bond for title."⁴³ If the two methods of conveying are identical, and the right to retract is the essential element of the conveyance, and that right or power is exhausted in her title bond for her separate property, why is it not also exhausted in her title bond for a conveyance of the homestead? It is held that a bond for title passes the superior title to the land in equity.⁴⁴ This is true, and it is for the very reason that there is potency in the instrument as a conveyance. True, it is an executory contract, but it is executed under all the solemnities of law intended for the wife's protection; in it she has had every safeguard thrown about her that she can at any time invoke. That it is in a sense not an absolute conveyance ought not to alter the rule, and make void her solemnly executed contract. The same reasoning may be fittingly applied to ordinary sales on credit. Here under the rules of our law, the contract is an executory one, and the superior title remains, it is said, with the seller until the full payment of the purchase money. Can it be argued that upon tender of the last payment the wife could then elect to retract, and by refusing to accept it defeat the conveyance? Something remains here to be done, to complete the conveyance; the purchase money must be paid. In each case something is contemplated to be done to complete the

⁴²*Warren v. Jones*, 69 Tex. 462, 6 S. W. 775.

⁴³*Angier v. Coward*, 79 Tex. 551, 15 S. W. 698.

⁴⁴*Wright v. Thompson*, 14 Tex. 558.

transaction, but upon a refusal the court has the power to compel it, and in neither case would it be depriving the wife of the homestead without her consent given in the most solemn manner known to the law. There is no magic in words, and whether the conveyance be of the homestead or the wife's separate property, the instrument should be construed according to the same rules, and both by the rules of ordinary conveyances, where not interdicted by positive law. *Angier v. Coward* apologetically declares that a "broad distinction exists between the two, which we are not called upon to discuss," but does not enlighten us as to what this distinction consists in.

Whatever may be said in disparagement of the doctrine denying the validity of such instruments, it is nevertheless the law of the land.⁴⁵

§ 123. — Her Mortgage.

It would be an inconsistency to admit the wife's absolute right to own property, and to convey it by an observance of the laws regulating such things, and to deny that she might mortgage such property, there being no statute forbidding it.⁴⁶ For certainly, if she may convey the entire fee, she may also convey the lesser estate. She may, by observing the statutory regulations bearing upon the manner of conveying, mortgage or otherwise encumber it for any purpose whatever. She may in this manner secure the debt of her husband⁴⁷ or anyone else. Such was not anciently the rule,⁴⁸ but is now beyond cavil. Where the conveyance is for the benefit of the husband, the transaction should, however, be closely scrutinized to the end that no fraud or undue influence deprives the wife of her property.⁴⁹ As has been said in a former section, the property only is bound, and to that extent the wife becomes surety.⁵⁰ And it seems that the

⁴⁵*Brewer v. Wall*, 23 Tex. 585; *Cross v. Everts*, 28 Tex. 523; *Goff v. Jones*, 70 Tex. 572, 8 S. W. 525; *Eberling v. Deutscher Verein*, 72 Tex. 339, 12 S. W. 205; *Winn v. Winn* (Tex. Civ. App.) 57 S. W. 80.

⁴⁶*Hall v. Dotson*, 55 Tex. 520.

⁴⁷*Wilkinson v. Rowland*, 3 Tex. App. Civ. Cas. (Willson) § 11.

⁴⁸*Shelby v. Burtis*, 18 Tex. 644.

⁴⁹*Hollis v. Border*, 10 Tex. 277; *Hollis v. Francois*, 5 Tex. 195; *Rhodes v. Gibbs*, 39 Tex. 432.

⁵⁰*Ante*, § 75.

mortgage by the wife may be for the security of debts to be subsequently contracted by the husband.⁵¹

§ 124. — Mechanic's and Other Liens for Improvements.

Upon her property not the homestead the wife may create a charge when the same is for expenses incurred for the benefit of such property. And should such transaction involve the erection of houses or improvements upon her land, the person laboring or furnishing the materials or tools for the erection of such buildings or repairs, as the case may be, will, upon a compliance with the terms of the statute regulating such liens, have a mechanic's or materialman's lien upon her property precisely as though she were sole. But this is not a written contract, but the statutory lien. So, also, would her personal property be liable, under the statute, to any carpenter, artisan, or workman who furnishes material and labor for, or labors upon, the repairing of such property, when placed with such person by the authority of the wife. This need not be in writing.⁵²

The lien for improvements of the homestead must be in writing,⁵³ signed and acknowledged by the husband,⁵⁴ signed and privily acknowledged by the wife,⁵⁵ and this consent must be obtained in the manner pointed out, before the materials are furnished or the labor performed.⁵⁶ This is the statutory mechanic's lien,⁵⁷ and which, in connection with other liens for improvements not contracted in accordance with the mechanic's lien law, will be more fully discussed in the chapter on homesteads.⁵⁸

§ 125. Extent of Estate Conveyed; After-Acquired Title.

The following questions were by the court of civil appeals

⁵¹Klein v. Glass, 53 Tex. 37; McCormick v. Blum, 4 Tex. Civ. App. 9, 22 S. W. 1054, 1120.

⁵²Rev. Stat. art. 3320.

⁵³Huff v. Clark, 59 Tex. 347; Cameron v. Gebhard, 85 Tex. 610, 22 S. W. 1033.

⁵⁴Kalamazoo Nat. Bank v. Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350.

⁵⁵Fullenwider v. Longmoor, 73 Tex. 480, 11 S. W. 500; Heady v. Bexar Bldg. & L. Asso. (Tex. Civ. App.) 26 S. W. 468.

⁵⁶Lyon v. Ozee, 66 Tex. 95, 17 S. W. 405; Walker v. House (Tex. Civ. App.) 24 S. W. 82.

⁵⁷Rev. Stat. art. 3304.

⁵⁸Post, chap. XVI.

certified to our supreme court: “(1) Where a married woman owned as her separate estate an undivided one-half interest in a tract of land (her brother owning the other half), and such married woman, joined by her husband, conveyed the whole estate by such a deed as is described above [the deed was by the wife joined by her husband, in all particulars regular, and granted, bargained, sold, and released unto the grantee the entire tract], would an after-acquired title to the other half by inheritance from her brother pass by such a deed to the grantee named therein?” (2) “Would a married woman be estopped by such a deed from asserting her after-acquired title?” The supreme court answered both of these questions in the negative.⁵⁹ The decision, though a comparatively recent one, was construing an instrument executed under the laws of 1846, and though the language of that act is not quite identical with our present statute, the decision is in perfect harmony with the present law. A married woman can make no contract, whether of conveyance or otherwise, unless the statute expressly or by fair implication gives her the right. All of our statutes since 1841 have pointed out a mode of conveying property in which she “may have a right, title, or interest,” or, as in our present statute, her “separate property.” The language of all the acts seems necessarily to imply “that the relation of the wife to the property must be such, at the time the conveyance is made, as to render it her separate estate; for it is that alone which the statute empowers her thus to convey.” So that it follows, the only title a purchaser from a married woman takes is just such title as she has at the time of the conveyance, and any title that may subsequently be acquired by her may be asserted notwithstanding such former deed. This is true notwithstanding her deed contains an express warranty of the title, for her covenants to warrant are not binding upon her.⁶⁰ They are not required by the statute. Her whole title passes as effectually without them. If she cannot be bound by her express warranty, she surely cannot upon an implied covenant.

⁵⁹Wadkins v. Watson, 86 Tex. 194,
22 L. R. A. 779, 24 S. W. 385.

⁶⁰Ante, § 68.

CHAPTER VII.

ESTOPPEL.

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| § 126. Generally. | § 134. Acts and Declarations of Her Husband. |
| § 127. Equitable Estoppel. | |
| § 128. — Fraud. | § 135. — Concerning Community Property. |
| § 129. — Illustrations. | |
| § 130. By Silence, Delay, or Laches. | § 136. By Deed. |
| § 131. Accepting Benefits. | § 137. By Election. |
| § 132. By Pleading; Application to Court to Sell. | § 138. By Inventory as Administratrix, etc. |
| § 133. Further of Her Declarations and Admissions. | § 139. By Judgment. |

§ 126. Generally.

The subject of estoppel, when applied to the acts and conduct of married women, is not altogether free from difficulty. At common law a married woman's deed was void, as were her covenants contained therein; she could not be sued upon, nor estopped by, them. Her most solemn acts done in good faith and for full consideration could not affect her interest in her estate, or that of her husband and children. She could make no contract, nor could she by other acts *in pais* create an estoppel; she could not do by such acts what she could not do by deed. She is not protected to this extent with us. A recognition of her separate identity as an individual capable of contracting, suing, and being sued has necessitated a further recognition of her power to bind herself by her acts and conduct in numerous instances. Yet by reason of her partial disabilities she may not at all times estop herself by her conduct or acts as though she were sole.

§ 127. Equitable Estoppel.

Estoppel by conduct, generally known as equitable estoppel, "consists in holding for truth a representation acted upon when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained."¹ And the essential elements of such an estoppel, as stated by that author, are as follows: (1) There must have been a false representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; (5) the other party must have been induced to act upon it.² This as a general doctrine has been recognized by our courts.³ But it is not every species of false, or even fraudulent, statement that will amount to an estoppel against a married woman; especially is this true in those cases where the law has specifically defined the purposes for which, and the manner in which, she may bind herself, and where to give effect to the estoppel would be to ignore the plain requirements of the law in a particular of which the person complaining was chargeable with knowledge.

§ 128. — Fraud.

The most familiar instances of effective equitable estoppel arising against a married woman are those in which she has been guilty of some overt act of fraud which has conduced to bring about a state of things against which she is seeking to be relieved. Courts will not ordinarily interpose to prevent a married woman's freely asserting her rights, when such course upon her part will not be highly inequitable toward others whose positions with reference to the thing in controversy have been prejudicially altered on account of her conduct. Yet, she cannot, simply because of her coverture, be allowed to perpetrate a fraud upon anyone. She has many privileges and immunities not common

¹Bigelow, Estop. 476.

²Ibid. 484.

³Burleson v. Burleson, 28 Tex.

383: Scoby v. Sweatt, 28 Tex. 713;
Equitable Mortg. Co. v. Norton, 71

Tex. 683, 10 S. W. 301.

to all persons, yet no immunity has ever been extended her against the consequences of her wilful acts done purposely to deceive another, and which have had that effect. None of our judges, many of whom have written in the most friendly encouragement of the rights of married women under the law, have ever gone so far. The principle is that if she is guilty of any positive act of fraud, or of an act of concealment or suppression which in law would be equivalent thereto, which act, representation, or concealment was intended to cause another to alter his position or condition, and her act has such effect, she is bound thereby, whether her act or representation be in keeping with truth or contrary thereto.⁴ But the act, whether representation, concealment, or silence, must be intentional upon her part,⁵ and must actually have had the effect of misleading the opposite party in some material matter affecting the transaction and caused him to act upon such conduct; and further, her act or conduct must have been upon a full knowledge of her rights before it will estop, for if she were wholly ignorant of her rights, or if the complaining party knew them, or if her conduct has not misled him nor in any manner induced the transaction, there can be no just inference of actual or constructive fraud, and of course no estoppel can result.⁶

§ 129. — Illustrations.

“If the owners of the homestead simulate a transaction in which a negotiable note would be secured by a valid and meritorious lien on the exempt estate, and their artifice succeeds in imposing upon an innocent party, they are estopped from denying

⁴Johnson v. Bryan, 62 Tex. 623; Berry v. Donley, 26 Tex. 737; Blagge v. Moore, 6 Tex. Civ. App. 359, 23 S. W. 466, 26 S. W. 305; Stone v. Sledge (Tex. Civ. App.) 24 S. W. 697; S. C. 87 Tex. 49, 26 S. W. 1068; Williams v. Ellingsworth, 75 Tex. 480, 12 S. W. 746; McLaren v. Jones, 89 Tex. 131, 33 S. W. 849.

⁵Wright v. Doherty, 50 Tex. 34; Crayton v. Munger, 9 Tex. 285; O'Brien v. Hilburn, 9 Tex. 297; Dun-

ham v. Chatham, 21 Tex. 231; Reagan v. Holliman, 34 Tex. 404; Fitzgerald v. Turner, 43 Tex. 79; Steed v. Petty, 65 Tex. 490; Wadkins v. Watson, 86 Tex. 194, 22 L. R. A. 779, 24 S. W. 385.

⁶Burleson v. Burleson, 28 Tex. 383; Reagan v. Holliman, 34 Tex. 404; Koenigham v. Sherwood, 79 Tex. 508, 16 S. W. 23; Wortham v. Thompson, 81 Tex. 348, 16 S. W. 1059.

the truth of their solemn statements, and cannot be permitted to prove that a lien their acts declared to be valid is void because their acts were false.”⁷ Where “the owners of a homestead made an absolute conveyance thereof with full warranty, taking from the apparent purchaser a promissory note for the deferred payment with a trust deed on the property to secure its payment,” and “afterwards the original vendors transferred and indorsed the note to H. [plaintiff], for value, who, in default of payment, procured the trustee to advertise and sell the property at public sale at which H. [the plaintiff] became the purchaser, receiving a deed from the trustee,” and upon being sued for a balance due upon the note the defendants set up homestead rights, and among other defenses, that the conveyance by them was not real, but colorable, being resorted to as an expedient to raise money by negotiating the note for the deferred payment and charging that plaintiff had notice of the real character of the transaction, it was held: “(1) If H. [plaintiff] had notice that the conveyance was made to the apparent vendee by the owners of the homestead, not on a real consideration, but that it was accepted by him for their accommodation and as a means of enabling [them] the owners to procure money, then the deed to the apparent purchaser divested as to him no homestead rights of the original owners. (2) If H. [plaintiff] had no such notice he could rely on the deed from those claiming the homestead, as having been sufficient to divest them of all interest in the property, and this even though the vendors had remained in possession of the property after executing the deed.”⁸

Defendants, to procure a loan on the wife's land on which they were not then residing, made sworn affidavits stating that it was not their homestead, which they claimed in another lot. This latter lot was deeded to them and designated as a homestead the day before the loan was obtained, and on the following day was reconveyed to their grantor. The wife during the negotiations was sick of a fever, then in childbed, then watching her sick infant until its death, and alleged that the application and mort-

⁷Heidenheimer Bros. v. Stewart, 65 Tex. 321; Campbell v. Crowley (Tex. Civ. App.) 56 S. W. 373.

⁸Hurt v. Cooper, 63 Tex. 362; Ey-

M. W.—9.

lar v. Eylar, 60 Tex. 315; Breneman v. Mayer (Tex. Civ. App.) 58 S. W. 725; Noel v. Clark (Tex. Civ. App.) 60 S. W. 356.

gage were fraudulently obtained from her, and that she did not know, and was not in a condition to know, the purpose of the papers signed by her. An alleged agent of the loan company participated in obtaining and designating the new homestead, but the mortgage trustee testified that he alone was its agent, and knew nothing of the transaction. It was held that the company's requested charge that the wife was estopped if the plaintiffs advanced the money on faith of the statement that the land was not a homestead should have been given; but the court in the course of its opinion remarked: "It cannot be ignored, however, that the testimony fails to show an active participation in the acts relied on as constituting the alleged estoppel by Mrs. Norton."⁹ And again, where the property was not actually used as a homestead, and the husband and wife, in order to obtain a loan of money against it, made an affidavit that they claimed no homestead whatever in the property, and upon the faith of these representations induced the lender to accept a mortgage upon the property as security for the loan, the husband and wife were estopped from claiming the property as homestead.¹⁰

If husband and wife represent that their homestead is in property upon which they then reside, and not in property upon which they seek a loan, and such representations are believed and acted upon by one making a loan and taking a lien against such property to secure it, they are concluded by their representations in the matter, and will not be permitted to assert homestead rights in the property mortgaged.¹¹ Even though the wife does not read the instrument containing such representations, if she signs and

⁹Equitable Mortg. Co. v. Norton, 71 Tex. 683, 10 S. W. 301.

¹⁰Carden v. Short (Tex. Civ. App.) 31 S. W. 246; Haswell v. Forbes, 8 Tex. Civ. App. 82, 27 S. W. 566. But see Hawes v. Parrish, 16 Tex. Civ. App. 497, 41 S. W. 132.

¹¹White v. Dabney (Tex. Civ. App.) 46 S. W. 653; Harmsen v. Wesche (Tex. Civ. App.) 32 S. W. 192; Howell v. Stephenson (Tex.

Civ. App.) 36 S. W. 302; Moerlein v. Scottish Mortg. & Invest. Co. 9 Tex. Civ. App. 415, 29 S. W. 162, 948; Scottish American Mortg. Co. v. Scripture (Tex. Civ. App.) 40 S. W. 210; Kempner v. Comer, 73 Tex. 196, 11 S. W. 194; Bowman v. Rutter (Tex. Civ. App.) 47 S. W. 52; Thompson Sav. Bank v. Gregory (Tex. Civ. App.) 59 S. W. 622.

the representations deceive, she is estopped. It is her duty to read it, and her negligence is culpable.¹² The reason why parties cannot estop themselves to assert homestead rights in property upon which they actually reside, by their statements that it is not homestead, is that one cannot say he has been deceived by statements which he was bound to know were false. It is one of the essential elements of an estoppel that the party pleading it must have believed the truth of the statements relied on, and been deceived thereby. One cannot shut his eyes to the actual use of property for homestead purposes, and say he believes the owners' statements that the property is not occupied or claimed for such purposes. So, if one has notice of the falsity of statements, even though it be through an agent representing him in the transaction,¹³ they will create no estoppel in his favor, however much they were intended to deceive, for they do not in fact have such effect.¹⁵

The doctrine here established in no way contravenes the law of conveyances of married women. It only holds good those conveyances and contracts which are good according to the rules of that law, but which are sought to be avoided for other reasons.¹⁵

§ 130. By Silence, Delay, or Laches.

Silence, no doubt, in a case where not to speak would be equivalent to a positive act of fraud, would work an estoppel against a married woman's asserting her otherwise enforceable rights. But the rule which construes as constructive fraud the silence and acquiescence of one who permits, without objection, a third person to acquire an interest in his property to the pecuniary loss of such person, on the faith that it belongs to another, will not be strictly applied to a married woman in reference to the dealings of her husband with her property.¹⁶ By reason of their relation and his lawful authority to manage her property, she has a right

¹²Moerlein v. Scottish Mortg. & Invest. Co. 9 Tex. Civ. App. 415, 29 S. W. 162, 948.

¹³People's Bldg. & Loan & Sav. Assn. v. Dailey, 17 Tex. Civ. App. 38, 42 S. W. 364.

¹⁴See authorities above; also

Stephenson v. Yeargan, 17 Tex. Civ. App. 111, 42 S. W. 626; Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S. W. 12; Hines v. Nelson (Tex. Civ. App.) 24 S. W. 541.

¹⁵See *post*, § 136.

¹⁶John v. Battle, 58 Tex. 591.

to expect at his hands only a lawful use of it, and her silence in the premises will not be chargeable to her except where such silence or suppression deceives an innocent person, contracting with reference to her property, and she intends that it shall do so. Justice Lipscomb has well said: "The exception is believed to be founded in the wisest policy growing out of, and essential to, the relation of husband and wife. She is required to accompany him in his wanderings through life, and to make the home of his choice her home, and it is not consistent with the harmony of the relation that she should proclaim the fraud of her husband when he offers to sell her property as his own."¹⁷ Our married women are not held to a speedy assertion of their rights under the law upon pain of estoppel if they be derelict. For the reasons above stated, and for the further reason that it is the husband's duty to protect the possession and enjoyment of the wife's property and rights generally, delay and laches are not usually grounds of estoppel against her, where the statutes of limitations are not prohibitive.¹⁸ Where the husband and wife made a parol gift of the wife's land to her son, assuring him that it should be his property in fee, and placed him in possession, and he and his family, with full knowledge of his donors, occupied the same until his death, nearly seven years, and his widow and children for six years longer, and made permanent and valuable improvements thereon, and the donors both before and after the son's death acknowledged the property to belong to him and his children, and promised to make a deed to the same, such facts did not estop the parents from recovering the land from the son's widow.¹⁹ In such a case the son was charged with knowledge that his mother's parol gift of the land to him did not convey the title to him, and was not binding on her, and therefore her subsequent repudiation of such gift, though it had been made with the intention to repudiate it, was not in law a fraud upon him. It is not that species of act or representations that is denounced in law as working an estoppel against a married woman. Her conduct, to estop her, must be such that it

¹⁷Warren v. Dickerson, 3 Tex. 460.
See also Parks v. Willard, 1 Tex.
350.

¹⁸See Cole v. Bammel, 62 Tex. 108.

¹⁹Robert v. Ezell, 11 Tex. Civ. App.
176, 32 S. W. 362.

would amount to a fraud upon another to permit her to assume a different position. At most her conduct in such case would only subject her to a liability for improvements made upon the property in good faith.²⁰

The wife's mere delay in making complaint against the use by another of her land unlawfully conveyed by her husband will not estop her upon the principle of laches or acquiescence. For neither acquiescence, nor yet express ratification, will make valid her husband's deed to her property, and no conduct upon her part which could possibly be a fraud upon another dealing with her husband being shown, there is no element of estoppel in it.²¹

§ 131. Accepting Benefits.

Nothing can be better settled in this state than that the title of a married woman to her separate real estate and her homestead will not pass from her except upon a deed duly signed and separately acknowledged by her in strict conformity with the statute regulating her conveyances. In some instances, as in adjusting equities against the homestead, the statute cannot apply, and there are other exceptions, some of which have already been noticed, which it is not necessary nor proper to here mention; but so faithfully have the courts adhered to the rule first stated that nothing the wife may do along the line of acquiescing in her imperfect conveyance, or accepting the benefits from its sale, will have the effect of validating it, either by ratifying the transaction, or by creating an estoppel against her to afterward claim it.²² Her willingness or even her anxiety to convey, her acquiescence in its use and occupancy by the purchaser, or her accepting the consideration for its sale, has nothing at all to do with the matter of validating an imperfect con-

²⁰Robert v. Ezell, 11 Tex. Civ. App. 176, 32 S. W. 362.

²¹Texas Trunk R. Co. v. Hall (Tex. Civ. App.) 24 S. W. 324; *ante*, § 37.

²²Grandjean v. San Antonio (Tex. Civ. App.) 38 S. W. 837, S. C. 91 Tex. 435, 41 S. W. 477, 44 S. W. 476;

Williams v. Ellingsworth, 75 Tex.

480, 12 S. W. 746; McLaren v. Jones, 89 Tex. 131, 33 S. W. 849;

Berry v. Donley, 26 Tex. 737;

Blagge v. Moore, 6 Tex. Civ. App.

359, 23 S. W. 466; Fitzgerald v.

Turner, 43 Tex. 79; Johnson v.

Bryan, 62 Tex. 623.

veyance of her land or homestead.²³ Purchasers must know, as matter of law, that a married woman cannot convey her property except in a certain manner, and they cannot rely upon her imperfect conveyance when they know it conveying. As said by Justice Denman in *Daniel v. Mason*, 90 Tex. 240, 38 S. W. 161: "If the mere execution of a deed and the payment of the purchase money constitute an estoppel, then in although a married woman has no capacity to convey therein wherein she is not joined by her husband, nevertheless the deed and its subsequent recording by the purchaser would prevent title by estoppel. Thus, the attempt to make a conveyance which she has no legal capacity to make would of itself be sufficient to estop her and her heirs from denying its force. This would virtually remove the disability of coverture. Such a rule has never been recognized in this state." An immunity from the effects of an estoppel extends to instances where she is asserting her rights as against an innocent purchaser for value, if the expression may be used in such connection that is, as against one who had no notice of her coverture consequent want of capacity to make such a deed. It is analogous to her promissory note not executed for one of the purposes mentioned in the statute; the vice consists in her incapacity to make such contract, and may be asserted at any time against anyone.²⁴ But in matters not controlled by the statute respecting conveyances, this rule has no application, and the rules of equity and estoppel apply to her conduct. So, in instances of sales of personal property, her partition deeds, agreements concerning her boundaries, condemnation proceedings, and the like, acquiescence, accepting benefits, and the like, she may estop herself.²⁵

§ 132. By Pleading; Application to Court to Sell.

But a married woman will not be permitted to disre-

²³Owen v. New York & T. Land Co. 11 Tex. Civ. App. 284, 32 S. W. 189. 1057; Huss v. Wells. 17 Tex. Civ. App. 195, 44 S. W. 33.

²⁵See San Antonio v. Granger 91 Tex. 430, 41 S. W. 477, 476; also McKinney v. M. (Tex.) 6 S. W. 793.

²⁴Daniel v. Mason, 90 Tex. 240, 38 S. W. 161.

sale of her property, brought about by her own procurement through an application to the court to sell. To permit her to thus impose upon the purchaser at such a sale would be a fraud of grossest character, which no court could permit.²⁶ But the court ordering the sale, even though it be upon her application, must have jurisdiction of the subject-matter, or else she will not be estopped.²⁷ This may in some degree partake also of the nature of an estoppel by judgment.

The case of *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 33 S. W. 383, is quite an important one in this connection. It was an action by children to recover the homestead of their deceased parents, sold by the administrator upon the community estate of the deceased parents, for the purpose of paying community debts. The children, some of whom were married women, took no part in the procuring of the sale, but subsequently became parties in the probate court to the proceedings on final settlement and distribution of the estate, and not only received the greater portion of the purchase money of the land, but also received unsold lands, which would have been subject to sale for the payment of the debts, if they had not been settled out of the proceeds of the sale of the homestead. The court of civil appeals, in deciding for affirmance of a judgment in favor of the purchasers of the property, said: "The heirs as plaintiffs below, treating the sale as void, had a right to bring their suit, relying strictly upon their legal title; but when the defendants, in their special answer, set up the proceedings on final settlement in the probate court in which the plaintiffs had participated, receiving the purchase money and the remaining assets, it then became necessary for them to restore, or offer to restore, what they had received before a judgment could be rendered in their favor." This case cannot be considered as an authority for the proposition that a married woman may, by accepting the purchase money for the unauthorized sale of her land, estop herself to recover it, even where she refuses to return the consideration, for such is not thought to be the law.²⁸ But its disposition was con-

²⁶Ryan v. Maxey, 43 Tex. 192; 359, 23 S. W. 466, S. C. 26 S. W. 305.
Dalton v. Rust, 22 Tex. 134.

²⁸Ante, §§ 72, 131.

²⁷Blagge v. Moore, 6 Tex. Civ. App.

trolled by the fact that to have permitted them to recover the homestead, and at the same time not only retain the benefits of its sale but other property as well, which would otherwise have gone to the purchasers of the homestead in settlement of their debts, would be to sanction a fraud, which no court can do;²⁹ and the further fact that the disposition of the property was also by virtue of the court's order,—estoppel by judgment.

§ 133. Further of Her Declarations and Admissions.

It has sufficiently appeared that the wife cannot by ratification affirm her imperfect conveyance of her realty. With reference to personal property she may ratify its unlawful disposition, and thus preclude herself entirely from recovering it, although the courts have often, under such circumstances, permitted her to recover upon a return of the benefits received. But in all cases before her declarations or admissions will estop her they should either go before, or in some way be conducive of, the act, so that they are in regard to that transaction fraudulent if not true. Thus, in *Thomas v. Williams*, 50 Tex. 269, the court said: "Nor will the declarations of the wife, nor her written recognition and ratification of the previous deed of her husband, not in conformity with the statute regulating conveyances by married women, but which are not shown to have misled the parties claiming under the deed from her husband to their injury, estop her from asserting her homestead rights."³⁰ Married women are no more privileged to practise a fraud or deception on another than are men, and their declarations and admissions when they are intended to, and do, have that effect, preclude them, whether true or false.³¹ Mr. Bigelow says that an action at law cannot be maintained on a contract made with a married woman who falsely represents herself to be sole at the time, the representation in such case not operating as an estoppel.³² But if that doctrine be sound at common law it can hardly be so held with us. It is difficult to conceive of the courts permitting such a fraud. The legal principle of the estoppel in such a case is

²⁹*McKinney v. Matthews* (Tex.) 6 S. W. 793.

³⁰See *ante*, § 129.

³¹*Cravens v. Booth*, 8 Tex. 243; *ante*, §§ 128, 129.

³²Bigelow, *Estop.* 514.

not that it holds as valid the contract, conveyance, or other act of the wife, but that she will not, because of fraud, be permitted to assert its invalidity. Precisely as she may preclude herself from asserting homestead rights against certain innocent mortgagees; not that the mortgage upon the homestead is valid, but that she shall not deny it, when in doing so she is guilty of gross fraud toward one who is in no way blamable. If the circumstances are such that the person dealing with her either knows, or should know, that she is a married woman, her statement to the contrary cannot deceive him, nor therefore estop her to plead coverture.³³

§ 134. Acts and Declarations of Her Husband.

There are certain things which the wife may authorize the husband to do for her. In matters of this sort his acts are, of course, her acts. She can no more commit a fraud through an agent than she can do so herself. And where any act of the husband affecting the wife is committed by her express authority lawfully given, the effect is exactly the same as though it were committed by her in person. But in no case can it be said that the acts or declarations of the husband will estop the wife, if she in no way authorized or knew of them until they had performed their mission of deception.³⁴ Thus, it is held that the husband's unauthorized delivery of his wife's deed to her land will not preclude her from recovering the land where she does not expressly ratify such act.³⁵ The wife is not estopped from recovering her property wrongfully disposed of by her husband upon the ground that his possession vested him with apparent title and authority to sell. His possession is a statutory one, expressly for her, and not adverse to her interest, and she is guilty of no wrong in permitting it. Indeed she has no power to prevent.³⁶

The same general rules apply to the homestead of the family

³³See *Schwarz v. National Bank*, 67 Tex. 217, 2 S. W. 865.

³⁴*Etheridge v. Price*, 73 Tex. 597, 11 S. W. 1039; *Ayers v. Fellrath*, 5 Tex. Civ. App. 557, 24 S. W. 347; *Newman v. Farquhar*, 60 Tex. 640;

Blair v. Finlay, 75 Tex. 210, 12 S. W. 983; *Terry v. Barbour*, 5 Tex. Civ. App. 474, 24 S. W. 381.

³⁵*Cole v. Bammel*, 62 Tex. 108.

³⁶*Kempner v. Huddleston*, 90 Tex. 182, 37 S. W. 1066.

as to the wife's separate property. The husband cannot by his own conduct, not participated in by the wife, create a charge upon the homestead by conduct which would otherwise operate as an estoppel *in pais* against him.³⁷ Her rights in such property are the equal of his; he has no right to dispose of it by deed, nor can he do so by estoppel.³⁸ If by the husband's fraudulent acts or representations he might estop himself and wife to assign the homestead, he would thus have it in his power to deprive the wife of her homestead in a manner not known to the Constitution and statutes, and, too, where she was in no sense to blame. He might himself do, by act or representation, what he and his wife both could not do by solemnly executed instrument, *vide* mortgage the homestead.

§ 135. — Concerning Community Property.

Since the husband's contracts concerning the community property not homestead are binding, he may also bind it by estoppel. Whatever acts or representations are binding upon him with respect to that estate are likewise binding upon her, whether by contract or estoppel. Even in cases where imperfect homestead rights exist, the wife may be bound by estoppel against her husband. Instances are where the homestead is in the equity, but the conduct, act, or representation of the husband to be binding upon the wife must be with reference to the particular lien or contract affecting the wife's equity. For it cannot be questioned that the husband is powerless to do by estoppel against the wife what he cannot do by express contract, *i. e.*, convey, or in any manner charge, the wife's homestead.⁴⁰ It is only where his individual contract could affect the wife's homestead that his conduct in that particular might do so. The case of *Schwarz v. National Bank*, 67 Tex. 217, 2 S. W. 865, does not assert a different rule. There if the wife ever had a homestead

³⁷Kallman v. Ludenecker, 9 Tex. Civ. App. 182, 28 S. W. 579; Seay v. Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181; Dotson v. Barnett, 16 Tex. Civ. App. 258, 41 S. W. 99.

³⁸Williams v. Galveston (Tex. Civ. App.) 58 S. W. 551.

³⁹Ranney v. Miller, 51 Tex. 20; Lochausen v. Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513.

⁴⁰Eckhardt v. Schlecht, 29 Tex. 129.

stead right in the property she was never in a position to assert it herself, for in deciding the case the court held that, by reason of the husband's false and fraudulent representations that he had no wife, he was estopped to plead that he had, and that the case should therefore be determined as though he was unmarried at the time of his conveyance. If the wife had homestead rights the court was never called upon to decide them. The judgment of the court in that *ex parte* proceeding no more determined them than could her husband's individual contract or conveyance.

§ 136. By Deed.

A married woman's deed not executed in strict conformity with the statute is no deed. It cannot receive any aid from her representations or acts evidencing a willingness to convey or execute in conformity with law, as an estoppel in the matter. The transaction, or instrument of writing where necessary to be a writing, must be tested by the rules of conveyances already noticed, and failing to be sufficient when thus tested, and the wife being clear of fraud in the matter of the imperfections relied upon, she may assert her rights to her property and repossess herself of it.⁴¹ Representations which, if made orally, would estop, would also have that effect if incorporated in the deed or instrument.⁴² But there is no such doctrine as that an instrument insufficient as a deed will be good as an estoppel, nor even as a contract, as against married women. If it were so we would have dispensed with the requirements of the Constitution and statutes regulating her conveyances, for every attempt to make a deed would upon some excuse be valid.

Recitals in the wife's deed when procured to be made by the fraud of the grantee will avail him nothing; if untrue their falsity may be shown.⁴³

A seemingly contrary rule to that stated in this section is in

⁴¹Stone v. Sledge, 87 Tex. 49, 26 S. W. 1068; *ante*, §§ 113, 114.

⁴²Scottish American Mortg. Co. v. Scripture (Tex. Civ. App.) 40 S. W. 210; Moerlein v. Scottish Mortg. &

Invest. Co. 9 Tex. Civ. App. 415, 29 S. W. 162, 948; Howell v. Stephenson (Tex. Civ. App.) 36 S. W. 302.

⁴³Hickman v. Stewart, 69 Tex. 255, 5 S. W. 833.

the case of partition deeds; but the contrariety is not real, for an agreement between adjoining landowners establishing a dividing line between their lands and a parol partition of lands are not prohibited by the statute of frauds, nor are they within the provisions of the statute regulating conveyances of real property,⁴⁴ and hence a deed of partition, not properly executed and acknowledged by the wife, would not for that reason alone be insufficient. Such a deed might estop her.⁴⁵ Or, to speak more accurately, such a deed could not in any manner lessen the binding force of a contract which need not under the decisions of our court be in writing at all.⁴⁶ Although the expression is to be met with in the decisions that the wife is estopped to repudiate her contracts of this character by reason of a defectively executed deed, still the reason for such a holding is no doubt upon the ground of the validity of the contract independent of the deed, rather than upon the theory of estoppel at all.

§ 137. By Election.

The most familiar example of this kind of estoppel is found in the case of wills. No person will be permitted to set up a right or claim, however meritorious, in opposition to the express terms of a will under which he has accepted a benefit, if the two rights are inconsistent. When confronted with the choice between a benefit as devisee in a will and a right in another capacity, he is put upon his election, and is concluded by his choice.⁴⁷ This estoppel differs from those previously noticed, in that there is no element of misrepresentation or fraud in it. To have the effect of an estoppel as here indicated, there must be in the will some provision the acceptance of which by the wife would be inconsistent with her right to claim in the capacity asserted;⁴⁸ and whether or not the wife has made an election is a question to be determined as any other question of fact.⁴⁹

⁴⁴*Lecomte v. Toudouze*, 82 Tex. 208, 17 S. W. 1047.

⁴⁵*Talkin v. Anderson* (Tex.) 19 S. W. 350; *Wardlow v. Miller*, 69 Tex. 395, 6 S. W. 292.

⁴⁶*Ante*, §§ 64, 65.

⁴⁷*Moss v. Helsley*, 60 Tex. 426.

⁴⁸*Moss v. Helsley*, 60 Tex. 426;

Philleo v. Holliday, 24 Tex. 38; *Little v. Birdwell*, 27 Tex. 688; *Mayo v. Tudor*, 74 Tex. 471, 12 S. W. 117; *Haby v. Fuos* (Tex. Civ. App.) 25 S. W. 1121.

⁴⁹*Mayo v. Tudor*, 74 Tex. 471, 12 S. W. 117. See *post*, § 162.

§ 138. By Inventory as Administratrix, etc.

No good reason can be seen why the wife should be conclusively estopped to claim her property, by reason of her having inventoried and returned the same as part of the estate of her deceased husband or of the community, upon qualifying as administratrix or executrix. Such act can at most only be held to be a circumstance against her title, but one that may be explained away.⁵⁰ If, in addition to so inventorying and returning such property, she proceeds further, and sells the same to a person without notice of her rights, a different question will arise. It is only where her conduct is fraudulent in its intention or results that she is estopped, and it cannot be seriously contended that the acts of the wife, extending no further than the return of her property as of another's estate, are in any sense fraudulent, or that her subsequent laying claim thereto, if mistaken in such return, would in the least respect be unjust. The contention has frequently been made, but never upheld.⁵¹ Nor, of course, can her acts in this respect affect the rights of her deceased husband's children by a former wife.⁵²

§ 139. By Judgment.

Estoppel by judgment is so intimately connected with the subject of judgments in general that the two cannot well be considered separately. It will suffice in this connection to say that married women are concluded by the judgments of courts having jurisdiction of the subject-matter and over their persons precisely the same as though they did not labor under the disabilities of coverture. It would be idle to permit them to sue or be sued if the result of such litigation should not be binding upon them. Of course they are not bound where they are not

⁵⁰Rev. Stat. art. 1981; *Haby v. Fuos* (Tex. Civ. App.) 25 S. W. 1121; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25; *Clapp v. Engledow*, 72 Tex. 252, 10 S. W. 462; *Teal v. Sevier*, 26 Tex. 516.

⁵¹*Dunham v. Chatham*, 21 Tex. 231.

⁵²*McCord v. Holloman* (Tex. Civ. App.) 46 S. W. 114.

properly before the court.⁵³ Nor are they bound by a judgment, unless the same vital point sought again to be put in issue was properly presented by the pleadings, and thus put directly before the court for determination, or was fairly within the scope of the matters necessarily determined by the court.⁵⁴ The rule in this respect is not different from that applicable to persons other than married women.

We have seen that a married woman is not estopped to reclaim her land when illegally conveyed, by the acceptance of the benefits of her bargain.⁵⁵ But a different question arises where she elects, after default by the purchaser, to institute foreclosure proceedings against him and obtains judgment of sale against the land in his hands. Here, to use the language of Lightfoot, Ch. J., she and her husband say, in effect: "We have sold this land to . . . [the defendant]. We have made him a title, reserving a vendor's lien thereon to secure the purchase money, and we invoke [the court's] power to foreclose this lien."⁵⁶ Being a proper party litigant, and the judgment foreclosing the lien and ordering the sale of the property being conclusive of the existence of the debt and lien, she is concluded by the judgment. This is estoppel, not by matter *in pais*, but by judgment of a competent court.⁵⁷

⁵³Read v. Allen, 56 Tex. 176; Owen v. New York & T. Land Co. 11 Tex. Civ. App. 284, 32 S. W. 189, 1057; Bradford v. Knowles, 78 Tex. 109, 14 S. W. 307; Williamson v. Conner, 92 Tex. 582, 50 S. W. 697; Wilson v. Johnson (Tex.) 60 S. W. 242; *post*, § 315.

⁵⁴Philipowski v. Spencer, 63 Tex. 604.

⁵⁵*Ante*. § 131.

⁵⁶Morris v. Turner, 5 Tex. Civ. App. 712, 24 S. W. 959.

⁵⁷See also Scales v. Johnson (Tex. Civ. App.) 41 S. W. 828.

CHAPTER VIII.

WIFE AS A MERCHANT.

§ 140. As a Sole Trader.

§ 141. As a Partner.

§ 142. Purchases on Credit.

§ 143. — and with Borrowed Money.

§ 144. Profits.

§ 145. Her True Relation to the Attempted Business.

§ 146. Presumptions; Burden of Proof.

§ 140. As a Sole Trader.

The growing importance of the subject at the head of this chapter, as evidenced by its frequent recurrence before the courts, probably demands for it a more extended notice than it would logically be entitled to. In spite of the fact that at marriage to the husband are committed the control and management of the wife's property, as well as their after-acquired common funds, and upon him is supposed to rest the duty of supporting his family, there is a marked tendency of married women to engage in various mercantile enterprises. This tendency is observed by most practitioners to develop most usually among wives who are married to bankrupt husbands, or, at least, is nearly always preceded by some financial disorder affecting the husband's credit. This prevalent practice of engaging in business in the wife's name has grown, no doubt, from the erroneous though popular view, that earnings and profits derived from an investment of the wife's funds become her separate property, and hence not liable for the husband's obligations. That the wife may own in her individual right such property as is ordinarily known as merchandise, is too plain for argument; but whether or not she can sell such property at a profit upon its cost to her, and again invest the proceeds in similar goods to be again sold, and the process of reinvestment repeated indefinitely, for the purpose of

acquiring gain, and the entire property be hers in her separate right, is quite a different question. There is no rule of law prohibiting a wife from becoming a merchant on her own account, but in the very nature of the enterprise, its successful management by her is so at variance with our whole theory of her marital disabilities that such a thing is well nigh impossible. For the very things most necessary to be done as a merchant are the very things she cannot do by reason of her coverture.

§ 141. As a Partner.

She can no more become a partner in such an enterprise than she can become a sole trader. She encounters the same difficulties in each instance. And it can make no difference whether her attempted partnership is with her husband or someone else.¹ If with her husband, the effect is to make him liable, and not her, for his agreement is binding and hers is not.² The marriage of a *feme sole* partner at once dissolves the copartnership, as her disabilities are such that she cannot longer continue in that relation.³

§ 142. Purchases on Credit.

Merchandise when purchased by the wife out of her own funds of course becomes her separate property, and she may sell the same for cash or on credit as she sees fit; and she may, provided she buys for cash, and uses only her separate funds, replenish her depleted stock from time to time; and to this extent she may become a merchant either upon her own account or as a partner with another, for she has done nothing inconsistent with the disabilities of her coverture, nor of which any creditor of the husband or community can complain. She is in this respect only using her own as she has a right to do. But she can-

¹Bradford v. Johnson, 44 Tex. 381; Wallace v. Finberg, 46 Tex. 35; Brown v. Chancellor, 61 Tex. 437; Miller v. Marx, 65 Tex. 131; Steinback v. Weill, 1 Tex. App. Civ. Cas. (White & W.) § 934; Purdom v. Boyd, 82 Tex. 130, 17 S. W. 606.

²Cleveland v. Spencer (Tex. Civ. App.) 50 S. W. 405; Cockrum v. McCracken, 1 Tex. App. Civ. Cas. (White & W.) § 65; Wallace v. Finberg, 46 Tex. 35.

³Brown v. Chancellor. 61 Tex. 437.

not, for the purpose of replenishing her stock, make purchases on credit with the expectation of paying therefor out of the profits of the enterprise. Such purchases become community property and immediately liable for the husband's debts.⁴ Indeed, the authorities tend to hold that purchases on credit by the wife necessarily become a part of the community estate, whether her intention at the time of the purchase be to make payment out of the community funds of herself and husband, or not. Such is probably the accepted doctrine of the cases cited. But it can hardly be said that the court in *Epperson v. Jones*, which is authority for the later cases, meant to state the rule so broadly. In that case the reason for holding the purchases on credit to be community property is put upon the ground that the husband, and not the wife, was liable for payment, and being his debt and payment entitled to be enforced against the community property, consequently the goods so purchased became a part of that estate rather than of the wife's. There was nothing to make them the wife's goods. She had neither paid nor intended to pay for them. The husband had made himself liable, and it was so held. The same may be said of the other cases following that doctrine. But no good reason can be shown why purchases by the wife on credit, where the credit is extended to her alone, and where all parties expect her to meet the deferred payments out of her own funds, and the husband's credit is in no way employed, are for that reason alone community property. True, the seller has no means of enforcing against her payment for such purchases, but that is a matter that concerns him, and him only; if he trusts the wife, and she afterward makes payment from her separate property, it would seem the new acquisition ought to be held to belong to her since her property was given in exchange for it. No reason exists for saying it should be community, and every reason exists for saying it should belong to her. If she refuses to comply with her contract of purchase, neither she nor her husband is liable. She has lost the money paid, and the seller that re-

⁴*Epperson v. Jones*, 65 Tex. 425, Tex. 29, 10 S. W. 732; *Hamilton-S. C.* 69 Tex. 586, 7 S. W. 488; *Brown Shoe Co. v. Lastinger* (Tex. Civ. App.) 26 S. W. 924. *Smith v. Bailey*, 66 Tex. 553, 1 S. W. 627; *Middlebrook Bros. v. Zapp*, 73 M. W.—10.

maining unpaid. But the community, not being liable, should not be benefited. If she bona fide expected to pay it should be hers; if not it would belong to neither. As said in *Epperson v. Jones*, 65 Tex. 425, S. C., 69 Tex. 586, 7 S. W. 488: "The property purchased takes immediately the same status and character as that given or to be given in exchange for it, and if the one is liable for the husband's debts, the other is also." It is not denied that if the husband in any way becomes liable for payment,—a very easy thing to do,—the above reasoning has no application. Upon the same arguments the purchases would then be community. And since in nearly every instance, the husband, either by expressly authorizing the purchases or permitting the same to be made under such circumstances as indicate a willingness to be bound, is really liable for payment, the purchases on credit by the wife are therefore community property.⁵

§ 143. — and with Borrowed Money.

So, it appears that the character of the fund from which payment is expected to be made will largely control the status or character of the new acquisition. If the one be community or separate, so will the other. Thus a promise to pay out of crops grown upon the wife's land is a purchase upon community credit, and the purchase not the wife's.⁶ The wife has no credit as a merchant, for the debts are not such as she may contract;⁷ hence the rare instances of such purchases becoming separate property. If the credit be secured by an hypothecation or pledge of her property the transaction is not distinguishable on principle from an ordinary purchase upon credit. While she would not be bound individually, her property would, and the controlling question is still, whether or not the husband's credit was in any way employed. Money borrowed by the husband with a mortgage by the wife upon her property as security is community, and its investment in a mercantile business will constitute it of that estate. If our reasoning in this and the preceding section be sound, then it would follow that money borrowed by the wife, either with or without pledging her property

⁵See *post*, § 192.

⁷*Wallace v. Finberg*, 46 Tex. 35.

⁶*Cleveland v. Cole*, 65 Tex. 402.

as security, if the husband's credit is in no way employed, and goods purchased with such money, will be her separate property. It is not certain from the facts as reported in *Heidenheimer Bros. v. McKeen*, 63 Tex. 229, whether this is in conflict with the rule as held in that case or not. There it was held that neither the money borrowed upon the faith of the wife's separate property as security, nor the merchandise in which it was invested, was her separate property. It does not appear whether the husband was liable for the repayment of the money or not. The inference is that he was. The following language is used: "Now, suppose that the debt incurred in securing the loan had been paid without any resort whatever to the deed of trust, it would not be insisted, we apprehend, that the money or merchandise either became the separate property of the wife, simply because her real estate had been used as a security for the debt," implying that her property was only secondarily liable. The interrogatory is susceptible of an affirmative answer if the husband's credit was not employed and payment was made out of the wife's separate funds. Then, surely, the money, and the merchandise purchased with it, would be the wife's.⁸

§ 144. Profits.

If profits derived from selling the wife's goods and merchandise were hers, she might become a merchant. For if she may not purchase upon credit, she may certainly buy for cash, and if to the original stock she could add from time to time the profits arising from her sales, her business would increase, and she would enjoy precisely the same privileges as could a stranger to the husband, so far as the latter's debts are concerned. But, as will more fully appear in the discussion of community property,⁹ profits derived from an investment of the wife's funds do not belong to her; without the addition of these profits, her business, her capital invested, from constant sales, expenses, and the like, would dwindle away and be lost, or, at least, would never be increased by the enterprise. If she engage in mercantile pursuits, she must either buy for cash or in such manner as not to involve her husband's credit, and be able at all times to point

⁸See post, §§ 184, 228.

⁹Post, § 190.

specifically to her property. She must not mingle with her own, goods purchased in any way upon her husband's credit, nor with the profits from her own investment; these are not hers.¹⁰ The husband and wife cannot, by their mere agreements between themselves, affect the rule, and convert community into separate property.¹¹

§ 145. Her True Relation to the Attempted Business.

Since a married woman may not, for the reasons we have discussed, become a merchant, it is well to note what effect her efforts to engage in such an enterprise will have upon her money invested. She may own separate property in merchandise, but upon engaging in the business of buying and selling it is, in the manner already shown, certain to become commingled with goods not belonging to her. Being unable, then, to preserve her property in such form as that she may always point with certainty to it, and the burden of doing so being ever upon her, she loses it to her husband's creditors, and is considered as a mere creditor of her husband, firm, or concern, as the case may be, to the extent of her investments.¹² And she occupies no better position than other general creditors.

§ 146. Presumptions; Burden of Proof.

It will be borne in mind that the presumption of the community character of property acquired by either spouse during marriage is very strong, and can only be overcome by clear and convincing proof that it belongs to one or the other of them, and that the burden of proving its separate character is always upon him who asserts it. Hence, it is not the duty of creditors seiz-

¹⁰Cox v. Miller, 54 Tex. 16; Green v. Ferguson, 62 Tex. 525; Miller v. Marx, 65 Tex. 131; Heidenheimer v. Felker, 1 Tex. App. Civ. Cas. (White & W.) § 362; Hamilton-Brown Shoe Co. v. Lastinger (Tex. Civ. App.) 26 S. W. 924; Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Middlebrook Bros. v. Zapp, 73 Tex. 29, 10 S. W. 732.

¹¹Cox v. Miller, 54 Tex. 16; Green v. Ferguson, 62 Tex. 525.

¹²Smith v. Bailey, 66 Tex. 553, 1 S. W. 627; Middlebrook Bros. v. Zapp, 73 Tex. 29, 10 S. W. 732; Purdon v. Boyd, 82 Tex. 130, 17 S. W. 606.

ing the stock found in the possession of the husband and wife, or either of them, for the husband's debts, to establish its community character. He may rely upon the legal presumption to that effect, and if the wife claims the property she must be able to show affirmatively that she acquired it in some way authorized by our laws. If it has undergone changes and mutations, she must be able to follow it through all these, and establish its identity.¹³

¹³Jones v. Epperson, 69 Tex. 586, 7 S. W. 488; Morris v. Hastings, 70 Tex. 26, 7 S. W. 649; Claflin v. Pfeiffer, 76 Tex. 469, 13 S. W. 483; Purdom v. Boyd, 82 Tex. 130, 17 S.

W. 606; Hamilton-Brown Shoe Co. v. Lastinger (Tex. Civ. App.) 26 S. W. 924; Ratto v. Holland, 2 Tex. App. Civ. Cas. (Willson) § 470.

CHAPTER IX.

TRANSACTIONS IN FRAUD OF WIFE.

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| § 147. Sale of Community Property by Husband; When. | § 151. Concerning Her Separate Property. |
| § 148. — Statutes. | § 152. Ratification by Wife. |
| § 149. Bona Fide Purchasers. | |
| § 150. Further of Fraud; Her Remedy. | |

§ 147. Sale of Community Property by Husband; When.

A few instances have arisen where children of a deceased mother have sought to recover of a purchaser their mother's one-half interest in community property, conveyed during the mother's lifetime by the husband, upon the ground that such conveyance was in fact fraudulent as to the wife, and therefore void. The result has been almost invariably a failure, not because the husband cannot be guilty of a fraud in conveying the community property, but because of the very great disfavor with which the law looks upon such attempts, and the extent of the beneficent presumptions in favor of honesty and fairness upon the part of the husband in such transactions. As said in a case of this character decided by Chief Justice Hemphill:¹ "Controversies of this character are painful in their nature, and the presumption must always be against the child who disavows the acts of the author of his life, and virtually or expressly charges him with fraud and wrong in squandering and alienating property not his own, but that of his children. 'Honor thy father and thy mother' is a command, not only of the Decalogue, but of nature; and suits in which rights can be claimed only through the alleged turpitude of a parent are not to be encouraged."

¹Stramler v. Coe, 15 Tex. 211.

Similar instances have arisen where the wife herself upon such charges has sought similar relief, and the like presumptions obtained. It does not follow from this, however, that the courts will in all cases refuse, or even hesitate, to set aside as void the husband's conveyance of the community property upon a proper showing by those injured. If such a transaction is intended to be in fraud of the wife's rights, and it actually has that effect, the courts will so declare. For the law has generously given him charge, control, and sole disposing power over that estate, as an aid to support the matrimony, and not as an instrument of oppression, with which to deprive the wife of that which rightfully belongs to her. He is a trustee for the community, with very great powers, but he must not abuse them. In actions of fraud generally, and between husband and wife specially, a very great latitude is allowed in ascertaining the motives and considerations prompting the parties. In an action of the kind under discussion it is proper to admit evidence showing what property the husband and wife respectively had at the time of their marriage, and what property they afterwards acquired, as are also the declarations of the husband as to what is community property, and also his statements claiming as community property that belonged to the wife. They tend to throw light upon his conduct with reference to the particular community property disposed of.² His conveyance or disposition of the community may be a legal fraud upon her rights, though not intended to wrong her. There may be an utter absence of intended fraud, yet the transaction be voidable. He has no right to make capricious gifts of such property, nor such disposition of it as tends to augment his separate estate to the detriment of the community. Thus, he cannot with the community funds purchase insurance upon his own life payable to his own estate or to a stranger, for such disposition of the community is not within the scope of his authority as trustee for the community. It would be void as to the wife.³

²*Smitheal v. Smith*, 10 Tex. Civ. App. 446, 31 S. W. 422.

³*Martin v. Moran*, 11 Tex. Civ. App. 509, 32 S. W. 904.

§ 148. — Statutes.

Article 2544 of the statutes reads: "Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers, or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser for valuable consideration,—unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." Under this statute the wife has been protected from a fraudulent conveyance by the husband to another, where such conveyance was made in anticipation of a divorce and for the purpose of depriving her of her community interest in the property and the grantee had notice of such fraudulent purpose.⁴ The language of the article quoted, "or other persons of or from what they are or may be lawfully entitled to," was held to apply to just such a case. But, independently of any statute, no court would feel wanting in power to protect the wife against so flagrant a wrong.

§ 149. Bona Fide Purchasers.

But before the wife or those claiming under her can avail themselves of the fraud of the husband in thus conveying the community property, they must be able to show a participation in, or guilty knowledge of, such fraud, upon the part of the purchaser, especially where he pays value. Everyone has the right to rely and act upon the husband's usual authority to dispose of the community property; and none are required to obtain the wife's consent before purchasing it. Nor can anyone presume that the husband would be guilty of a fraudulent disposition of the same. It follows, then, that purchasers in good faith and for value, from the husband, ought to be protected in their pos-

⁴*Bicocchi v. Casey-Swasey Co.* 91 Tex. 259, 42 S. W. 963.

session.⁵ It is the knowledge, actual or constructive, of the purchaser, that a fraud is being perpetrated upon the wife, that vitiates the transaction.

§ 150. Further of Fraud; Her Remedy.

It would be impossible to say what particular acts of the husband will be fraudulent as to the wife. Each transaction must be judged, partly by the motives prompting the conveyance, and partly by the actual or probable results as affecting the wife's interests. Due allowance must be made, however, for mistaken judgment of the husband in the administration of the community. He is not a guarantor to his wife that all his ventures will prove advantageous. Loss may result to her from an honest administration by him; for this he is not responsible to anyone.

In *Stallings v. Hullum*, 79 Tex. 421, 15 S. W. 677, the husband represented to the wife that he could obtain the sum of \$2,500 for their property, which was their homestead, and thereby induced her to sign and acknowledge the deed. This she did without reading the instrument. The recited consideration was \$2,000. After the execution of the instrument by the wife, the husband accepted from the purchaser \$1,000 and delivered the deed to him. The purchaser knew the wife was ignorant of the real amount paid, and the whole transaction was in furtherance of a previously arranged plan between himself and the husband. These facts were held to be sufficient to avoid the deed in a suit brought by the wife for that purpose. Even though the purchaser in that case had been ignorant of the representations made by the husband to the wife, it was said that if he paid to the husband \$1,000 less than the consideration recited in the deed, pursuant to an agreement entered into with him before the execution of the deed, he must have known that he was consummating a contract which the wife had not made, and which was

⁵*Harris v. Hardeman*, 15 Tex. 466; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *Yancy v. Batte*, 48 Tex. 46; *Webb v. Burney*, 70 Tex. 322, 7 S. W. 841; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Hensley v. Lewis*, 82 Tex. 595, 17 S. W. 913.

fraudulent as to her, and necessarily could not be enforced against her.⁶

In *Kuhn v. Foster*, 16 Tex. Civ. App. 465, 41 S. W. 716, the husband represented to the wife that he was borrowing money from Foster, and that the papers which she was called upon to sign constituted only a mortgage upon their homestead which could never be enforced against her, and she signed upon such representations. The grantee in the instrument, which was in form a warranty deed, had no knowledge whatever of the husband's statements to his wife, and acted in good faith in the matter. A contemporaneous agreement was executed by the parties that the property should be resold to the husband and wife upon the payment of a stipulated sum within a given time. The wife, joined by her husband, sued to have the instruments declared a mortgage upon her homestead, and hence void, but did not allege that the transaction was intended as a security for a debt. It was held that the only issue was as to the legal effect of the papers mentioned, and since the grantee knew nothing of the fraudulent statements of the husband to the wife, that there was no question for the jury, and a directed verdict for the defendant proper.

§ 151. Concerning Her Separate Property.

The husband has no power, under our laws, to sell or otherwise dispose of the wife's separate property, except he be authorized by her to do so. Any disposition of it by him without her consent would, as to her, be fraudulent and void. It would be an abuse of his statutory trust. His unauthorized indorsement of her promissory notes conveys no title, where the indorsee has notice of her rights.⁷ His appropriation to his own use of her individual fund, renders his own, as well as the community estate, liable to her for reimbursement.⁸ Any act endangering the *corpus* of her property is in law fraudulent, whether such in

⁶See *Cole v. Bammel*, 62 Tex. 108.

⁷*Richardson v. Hutchins*, 68 Tex.

⁸*Kempner v. Comer*, 73 Tex. 196,

81, 3 S. W. 276.

11 S. W. 194; *Linn v. Willis*, 1 Posey, Unrep. Cas. (Tex.) 158. See *ante*, § 39.

intention or not. It is an attempt to exceed the authority conferred upon him by law.

§ 152. Ratification by Wife.

It may happen that the wife, by ratifying the act of her husband, will preclude herself from pleading his fraud. To ratify upon a full knowledge of the facts is to have authorized in the first place, so far as her right to avoid is concerned. But her ratification must be a conscious, intentional approval of the husband's act. Mere failure to disaffirm is not sufficient. Indeed the courts have leaned very far toward ignoring her ratification of his unauthorized act, and permitting her to recover her property, even where she has done those things which would, were she *sui juris*, amount to ratification. Ordinarily, accepting the purchase money of a sale of her property would preclude one from recovering the property, yet she has been permitted by a return of the purchase money to recover.⁹ In an Arkansas case,¹⁰ where the husband, without authority, sold a horse belonging to the wife, and gave the purchaser an order to the wife, and she, without consenting or dissenting to the sale, permitted the horse to be taken away, it was held that she had not ratified the sale and could recover the property. Where, however, ratification is relied upon to estop her from asserting her rights, it should be clearly shown that she knew her rights, knew the extent of the unlawful act, and intended to approve it.¹¹

⁹Woodward v. McNeill, 75 Tex.

146. 13 S. W. 222. See *ante*, § 42.

¹⁰Lafargue v. Markley, 55 Ark. 423,
18 S. W. 542.

¹¹See *ante*, § 131.

CHAPTER X.

TORTS AND CRIMES.

§ 153. Wife's Torts Generally.

§ 154. Her Liability for the Torts of
Her Agents.

§ 155. Husband's Torts Committed
against the Wife.

§ 156. Wife's Crimes.

§ 153. Wife's Torts Generally.

A married woman was by the common law incapable of binding herself by contract, and therefore, like an infant, she could not be made liable for a wrong in an action for deceit or the like, when this would have in substance amounted to making her liable on a contract. In other cases of wrong she was not under any disability, nor had she any immunity; but she had to sue and be sued jointly with her husband, inasmuch as her property was the husband's, and the husband got the benefit of a favorable judgment, and was liable to the consequences of an adverse one.¹ While adopting a system of marital laws very greatly at variance with the common law, we have not altogether abrogated the common-law doctrine upon the subject of torts of married women. It is said that the common-law rule, holding the husband liable for the wife's torts, does not rest entirely upon the ground that he takes by marriage all of her personal property, and that she is presumed to have no separate estate. It rests, perhaps, mainly upon the supposition that her acts are the result of the superior will and influence of the husband. "Owing to the intimate relation between husband and wife, and to the nature of the control given him by law and social usage over her conduct and actions, it would be difficult, if not impossible, for the courts to determine when she had acted at her own in-

¹Webb's Pollock, Torts, 63.

stance, and when she was guided by his dictation. While our statutes are framed with the view of securing to the wife her separate property, and of sedulously protecting her with reference to it, against the recognized and controlling influence of the husband over her conduct, it would be a stretch of judicial authority to hold that the common-law responsibility attaching to him for the acts of the wife is, by mere implication, abolished.”²

Not only is the husband liable for her torts, but she is liable herself, except where she acts under the coercion of her husband.³ Many courts have held that, since the husband and wife are in contemplation of law but one person, the torts of the wife, committed in the presence of the husband, are presumed to be impelled by his marital power, and that she is not liable at all, but that this presumption may be overcome by proof.⁴ But this doctrine is peculiarly applicable to those states where the common-law fiction of unity still obtains. With us it is greatly relaxed, and the reason that prompted such a holding does not exist to the degree that it formerly did.

Where the husband had been compelled to pay a judgment recovered against him for the wife's tort, some question might be raised as to the wife's liability to him for reimbursement out of her separate estate in case she had one. But when it is remembered that the husband's liability for her torts is based more upon his supposed authority over her person, and consequent responsibility for her conduct, than upon the theory that her property is his, and that she cannot therefore respond to a judgment, it is plain that he would have no such right, against her. Judgment is permitted against him because of his supposed personal liability. He is a joint tortfeasor, and cannot seek contribution against anyone, much less his wife.

²McQueen v. Fulgham, 27 Tex. 463; Zeliff v. Jennings, 61 Tex. 458; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947.

³Crawford v. Doggett, 82 Tex. 139, 17 S. W. 929; Dailey v. Houston, 58 Mo. 361; Carter v. Jackson, 56 N. H. 364; Ball v. Bennett, 21 Ind. 427.

⁴Nolan v. Traber, 49 Md. 460; Ball v. Bennett, 21 Ind. 427; Kosminsky v. Goldberg, 44 Ark. 401; Baker v. Young, 44 Ill. 42; Carleton v. Haywood, 49 N. H. 314; Miller v. Sweitzer, 22 Mich. 391; Chauviere v. Fliege, 6 La. Ann. 56.

§ 154. Her Liability for the Torts of Her Agents.

For all torts committed by a married woman during coverture in person, except those committed by her under coercion of her husband, and such as are connected with her invalid contracts, and such as are committed against her husband, she is liable, as has been seen. Thus, she may be sued for assault and battery; for slander; for trespass; for conversion; for burning property and the like. But at common law she could not be held responsible for the act of another as her agent because she could not contract, and hence could have no agent. It is clear that before a person can be held liable for the act of an agent there must be the relation of principal and agent, or master and servant, existing between them. This relation, too, must be a contract relation. For the foundation of the rule, *respondeat superior*, is contract, express or implied, by means of which the servant stands in the place of the master, so that in law his act is regarded as the act of the master. And where there can be no contract the relation does not exist, and there is no foundation for the rule. So, it follows that the wife is never liable for the act of another save in those cases where that other is acting as her duly authorized agent, in a matter concerning which she is authorized by our law to contract with him. Her liability is now greater than it was at common law in this respect, since now there are many things that may be done by her through an agent. And where she may have an agent, and that agent commits a tort in the management of her business, there is nothing to prevent the rule of *respondeat superior* applying as though she were sole. Doubtless it would be required that her contract with her agent be a personal, conscious one, and not the mere statutory control and management given to her husband;⁵ for as to her this control is in no sense the result of contract. His torts, or the torts of those under him, in the management of her business, unless she has authorized them in some way, could not fairly be attributed to her.⁶

⁵Henry v. Voltz, 1 Tex. App. Civ. Cas. (White & W.) § 775.

⁶Collier v. Struby, 99 Tenn. 241, 47 S. W. 90.

§ 155. Husband's Torts Committed against the Wife.

The wife may be the recipient of wrong the same as though she were sole, and where that wrong is imposed upon her by another than her husband, she has her legal redress. But out of deference to the rules of the common law, for no better reason has been given, it is not thought proper to allow her an action against her husband for an injury inflicted upon her person or reputation. He may thereby expose himself to a criminal prosecution if he violates the penal law, but he is not liable to her in a civil action for damages,⁷ either during nor after the coverture. In *Nickerson v. Nickerson*, 65 Tex. 281, the court says that the rule denying the wife's right to sue the husband for a tort committed upon her person has been often said to rest upon their entire unity; but it would seem to us to rest rather upon grounds of public policy. This latter is the only ground tenable with us. We deny their unity, and permit her to sue when her rights are inconsistent with her husband's. We even permit her to sue her husband with respect to her property. Can it be argued that public policy is more greatly outraged by the wife's suing her husband for a brutal assault upon her person, or malicious slander of her fair name, than upon an ordinary debt or insignificant conversion of her property? Yet we permit the latter and deny the former. And the action is placed upon the grounds of public policy. It is nothing to say that such actions should not be encouraged; neither should any character of suits between husband and wife be encouraged; but out of the great necessity of the case they are permitted, and even specially authorized. The public sin is no greater in one instance than in the other.

§ 156. Wife's Crimes.

"A married woman who commits an offense by the command or persuasion of her husband shall not in any case be punished by death, but may be imprisoned for life, or a term of years, according to the nature and degree of the crime; and in cases not

⁷*Nickerson v. Nickerson*, 65 Tex. 281; *Cooley*, Torts, 223, 227; *Peters v. Peters*, 42 Iowa, 182; *Libby v. Berry*, 74 Me. 286.

capital she shall receive only one half the punishment to which she would otherwise be liable."⁸

With the foregoing limitation, and the further exception that she cannot be an accessory to an offense committed by her husband,⁹ she is amenable to the law for every infraction thereof as fully as though she were sole, or a man. She may sign any necessary recognizance or bond, in a proceeding wherein she is defendant, and she and her property are bound by it.¹⁰ She may be prosecuted for an offense committed by her against her husband, such as assault, assault and battery, and the like. There are, however, some offenses which she cannot, because of her disability to contract, commit. She cannot be guilty of our statutory offense of disposing of mortgaged property, where the property mortgaged by her is community property, for she has no power to mortgage it, and her instrument would not be the "valid subsisting mortgage" required in a criminal prosecution. Nor could she mortgage her own property except with the consent of her husband.¹¹ She may, by aiding and abetting another to commit a crime, herself be guilty as a principal, and punished as such, or as an accomplice, according to the facts.

⁸P. C. art. 36.

⁹Ibid. art. 87.

¹⁰Code Crim. Proc. art. 312.

¹¹See *Jones v. State*, 31 Tex. Crim. Rep. 252, 20 S. W. 578.

CHAPTER XI.

WILLS.

§ 157. At Common Law.

§ 158. Statutes.

§ 159. Property That may be Willed.

§ 160. Construction; Illustrations;
Cases.

§ 161. Husband and Wife's Joint
Will.

§ 162. Husband's Will; Election by
Wife.

§ 163. How Revoked.

§ 157. At Common Law.

At common law the will of a married woman was generally a mere nullity, because by marriage her legal existence ceased; she had no separate disposing power either by conveyance or will; she was not *sui juris*; she was under the power and control of her husband. Her inability to make a will was also partly due to the fact that she had nothing to dispose of, for by law her property became her husband's absolutely. There were exceptions to the rule, as where her husband was civilly dead, and she was in consequence acting as a *feme sole*; or where she made a will under a power, for in executing a power she was not restricted by the disabilities of coverture.¹

§ 158. Statutes.

"Every person aged twenty-one years or upward, or who may be or may have been lawfully married, being of sound mind, shall have power to make a last will and testament, under the rules and limitations prescribed by law."²

"Every person competent to make a last will and testament may thereby devise and bequeath all the estate, right, title, and interest in possession, reversion, or remainder, which he has or at the time of his death shall have of, in, or to any lands, tenements, hereditaments, or rents charged upon or issuing out of them, or shall have of, in, or to any personal property whatever, subject to the limitations prescribed by law."³

¹Stewart, *Hus. & Wife*, 343, 344.

²*Ibid.* art. 5334.

³Rev. Stat. art. 5333.

“Any person who is competent to make a last will and testament under article 5333 may dispose of his property by a nuncupative will made under the conditions and limitations herein after prescribed.”⁴

“The husband or wife may by last will and testament give to the survivor of the marriage the power to keep his or her separate property together, until each of the several heirs shall become of lawful age, and to manage and control the same under the provisions of law relating to community property, and such other restrictions as may be imposed by such will; provided, the surviving husband or wife is the father or mother, as the case may be, of the minor heirs; and provided further, that any child or heir, entitled to any part of said property, shall, at any time upon becoming of age, be entitled to receive his distributive portion of said estate.”⁵

The will is not to be acknowledged as deeds are.⁶

§ 159. Property That may be Willed.

Prior to the act of July 24, 1856, the doctrine of forced heirship applied in this state, as borrowed from the Spanish and Mexican law, and one's property was not so freely passed by will. Only a certain portion was thus disposable; one fourth of the testator's estate not being subject to his testamentary disposition. A testator might deprive his descendants or ascendants of their legal portion for just cause, such as for having attempted to kill him, and for having accused him of a crime punishable by death and the like; but the causes had to be distinctly set out in the testamentary instrument, and were the well-defined exceptions to the rule.⁷ A parent then, owning but a moiety of the community, could, under that law, dispose of but three fourths of such moiety;⁸ and any attempted disposition of the remainder was inoperative. The act referred to in the beginning of this section repealed the law of forced heirship, and empowered a testator to dispose of, by last will and testament, all his estate, right, title, and interest in possession, reversion, or

⁴Ibid. art. 5338.

⁵Ibid. art. 5350.

⁶March v. Huyter, 50 Tex. 243.

⁷Schmidt's Civil Law, § 7, p. 231.

⁸Conn v. Davis, 33 Tex. 203.

remainder, in and to any property, real or personal, as explained in article 5334 of the statute quoted in the preceding section. That this act includes married women cannot be questioned, even in the absence of a judicial determination of the matter. For we have always recognized her right to own a separate estate, and enjoy it fully, except that during coverture her husband has the control and management for her benefit. During coverture she cannot convey without her husband's consent, for the reason that he is entitled to the use of her property to aid him in supporting her; but upon her death he no longer needs it for such purpose, and the reason for thus limiting her inherent power of disposition no longer exists. She may then will her property, whether her husband consents or not.⁹ It is not the statutory conveyance contemplated by our statutes of conveyances. Not only may she will her separate estate, but her interest in the community is of such a character and extent that she may also will it. She owns, subject to the legal charges for debts and the like, one half of that estate, and may to that extent dispose whether her husband consent or not. But it has never been thought that either spouse could by his last will and testament affect the surviving spouse's interest in that estate. The early Spanish law positively forbade it.¹⁰ It is only to the extent of his or her interest that the community may be disposed of by will of a deceased spouse.¹¹

The right of the owner to dispose of his property by will is expressly stated to be "subject to the limitations prescribed by law," and with reference to the homestead there are numerous limitations prescribed,—constitutional as well as statutory. The right to dispose of the homestead has been the subject of very careful consideration by our courts. The Constitution provides that the homestead shall descend and vest in like manner as other real property of the deceased, but shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may

⁹Engleman v. Deal, 14 Tex. Civ. App. 1, 37 S. W. 652.

¹⁰Thompson v. Cragg, 24 Tex. 602.

¹¹Brown v. Pridgen, 56 Tex. 124;

Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Mealy v. Lipp, 16 Tex.

Civ. App. 163, 40 S. W. 824, S. C. 91

Tex. 182, 42 S. W. 544.

elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court, to use and occupy the same.¹² While the section specifically mentions only heirs, it is held to apply to devisees with equal force, since their rights can be no greater than those of heirs. As said in *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82, it is not the policy of our law to make any distinction in favor of one who takes land by devise as against one who takes as an heir. Both take subject to the rights of creditors, and all are subject to the rights of homestead of the survivor and minor children. The devisee may take the fee in the homestead, but it is subject to the right of the survivor and the minor children through their guardian, to occupy the same as a homestead.¹³ This is also the rule where the wife dies leaving separate property which was homestead of herself and husband. He will have the right to occupy so long as he may think proper, and the rights of the devisee are subordinate thereto.¹⁴ In case of the death of the husband, there is what may be denominated a "probate homestead," or such as is set apart to the widow and minor children of the deceased by the probate court. This is a peculiar homestead right not given to the husband nor to the children in case of the wife's death, and is not a right by descent at all. If the deceased husband's estate proves to be insolvent, by statute, the title of the widow and children becomes absolute,—that is, they take the fee; hence under such circumstances there can be no such thing as a devise of the homestead.¹⁵ The devise would only be operative where the estate was solvent and the widow and children no longer occupied the homestead.

§ 160. Construction; Illustrations; Cases.

There can probably be little excuse or necessity for entering into any discussion whatever of the rules of the construction of wills, as that belongs more especially to the works upon that sub-

¹²Const. art. 16, § 52.

¹³*Haby v. Fuos* (Tex. Civ. App.)

¹⁴*McAllister v. Godbold* (Tex. Civ. App.) 29 S. W. 417. 25 S. W. 1121. See also *post*, § 373.

¹⁵*Reed v. Talley*, 13 Tex. Civ. App. 286, 35 S. W. 805.

ject. So, the only purpose here is to notice a few of the adjudicated cases of married persons' wills, and see with what limitations, if any, the rules usually applicable to wills are applied to them. And first, a rule that is somewhat, though not altogether, peculiarly applicable to the will of a married person, is this: In the absence of a clear intention to the contrary, a testator who devises the community property is presumed to intend only his portion or interest in such property.¹⁶ If the language used is at all susceptible of that construction it ought to be held that the testator meant only to dispose of his own, and not to interfere with the other spouse's interest in the community.¹⁷ Such expressions as "all my property, real, personal, and mixed,"¹⁸ "my interest in,"¹⁹ "all my right and title," and the like, ought to be so construed, in the absence of other expressions making clear the intention to include all.²⁰

An insurance policy upon the husband's life, payable upon his death to his wife, "her executors, administrators, or assigns," being her separate property, will not pass to the husband upon the wife's death, under the provision of her will bequeathing to him all her "interest in" the community property. It is the wife's separate property, and the husband, no other disposition being made of it by the wife, takes according to the laws of descent and distribution,—that is, one third.²¹

A bequest by the husband to the wife in words, "I give to my wife, to control and use as she may see proper, in every respect her own," of certain lands,—passed the fee to her absolutely, notwithstanding the absence of those words usually necessary at common law to pass the estate in fee simple, in view of article 627 of the Revised Statutes, which is: "Every estate in lands which shall hereafter be granted, conveyed, or devised to one, although other words heretofore necessary at common law to transfer an estate in fee simple be not added, shall be deemed

¹⁶Crosson v. Dwyer, 9 Tex. Civ. App. 482, 30 S. W. 929.

¹⁷Smith v. Butler, 85 Tex. 126, 19 S. W. 1083; Sutton v. Harvey (Tex. Civ. App.) 57 S. W. 879; Clark v. Catron (Tex. Civ. App.) 56 S. W. 99.

¹⁸Crosson v. Dwyer, 9 Tex. Civ. App. 482, 30 S. W. 929.

¹⁹Moss v. Helsley, 60 Tex. 426.

²⁰Gibony v. Hutcheson, 20 Tex. Civ. App. 581, 50 S. W. 648.

²¹Evans v. Opperman, 76 Tex. 293, 13 S. W. 312.

a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law."²²

Again, the rule is almost universal that the intention of the testator, when ascertained, will govern in the matter of construction; and that if one section of the instrument be doubtful or ambiguous, the entire context of the testament will be looked to to ascertain that intention.²³ To illustrate: A testator evidencing his intention to dispose of his property share and share alike between his wife and daughter, and setting out by descriptions the part to each, the title to that part set aside to one failing, the court considered that the intention of the testator that his wife and daughter should share equally in his estate should not be frustrated, and the loss should fall upon the estate, and not the individual.²⁴

A bequest to the wife of an estate, "to be kept together during her natural life" to support herself and children, and to be divided among them upon reaching their majority or marriage as she might think proper, and authorizing her "to sell, alien, or convey any portion of the same," whenever she might think proper; and finally, that she might by will make final disposition of whatever remained thereof at her death, but, should she fail to do so, that then the residue was to be divided equally among the children,—conferred upon her only a life estate. A power was conferred, limitless in extent, but which, if not exercised as directed, availed nothing, as the husband's will directed how the remainder should go.²⁵ And under an absolute power to alienate by deed or will, although the estate bestowed be only a life estate, with remainder over, the devisee may alienate in obedience to the power, notwithstanding it be done for the express purpose of defrauding her creditors;²⁶ but not if to defraud the residuary legatees or devisees.²⁷

A bequest by one spouse to the other of his property for life,

²²May v. San Antonio & A. P. Town Site Co. 83 Tex. 502, 18 S. W. 959.

²³Cleveland v. Cleveland, 89 Tex. 445, 35 S. W. 145.

²⁴Lake v. Copeland, 82 Tex. 464, 17 S. W. 786.

²⁵Weir v. Smith, 62 Tex. 1.

²⁶Hanna v. Ladewig, 73 Tex. 37, 11 S. W. 133.

²⁷Gibony v. Hutcheson, 20 Tex. Civ. App. 581, 50 S. W. 648.

with remainder over, that is void, without making further disposition of the remainder, is as though decedent had died intestate as to such remainder, and it would descend as other property; and the husband or wife taking the life estate under the will would be entitled to his or her distributive share.²⁸

"Our children," in a testamentary instrument bequeathing to a man's wife and children, would ordinarily mean the common children of the testator and his wife, unless from other language used it was evident that it was meant to include others.²⁹

While the word "children," as used in our statute of wills, includes descendants of whatever degree they may be, it being understood they are only counted for the child they represent.³⁰

And the words "my children" mean all the children of the testator, whether by his present or a former wife.³¹

The husband's will directing that the community property shall go according to law, except that a sister should be excluded, where under the law the husband dying intestate the widow would take all, does not evidence an intention upon his part to divert his portion of the community from his wife, and give it to brothers and sisters not named.³²

§ 161. Husband and Wife's Joint Will.

Instances have arisen where the husband and wife have jointly executed a will making mutual bequests to each other and common bequests concerning heirs or devisees. Such wills have occasioned great contrariety of opinion generally, but our courts have recognized their right to probate, upon the death of one of the testators, as his will.³³ From the very nature of wills, such an instrument cannot operate as the joint or mutual will of the parties while one of them survives. In some of the authorities it is intimated that the wife may be a party to an agreement to make mutual wills, but that to be binding upon her such agree-

²⁸Philleo v. Holliday, 24 Tex. 38;
Moss v. Helsley, 60 Tex. 426.

²⁹Crosson v. Dwyer, 9 Tex. Civ.
App. 482, 30 S. W. 929.

³⁰Rev. Stat. art. 5346.

³¹Carroll v. Carroll, 20 Tex. 732;
Her. Prob. Guide, § 734.

³²McCown v. Owens, 15 Tex. Civ.
App. 346, 40 S. W. 336.

³³Wyche v. Clapp, 43 Tex. 543;
March v. Huyter, 50 Tex. 243.

ment must be executed in the manner prescribed by law for the execution of her contracts. But, says the court in *Wyche v. Clapp*, 43 Tex. 543: "Be this, however, as it may, it has been held in no case which has come under our observation, and could not in sound principle be so held, as we think, that the mere execution of an instrument in the form of a joint will can be given by construction the effect of a contract or agreement to make mutual wills which will authorize a court of equity to fasten a trust upon the estate of the defaulting party, much less to warrant its dealing with the survivor as a debtor previous to his death, for his half of a legacy so bequeathed."

§ 162. Husband's Will; Election by Wife.

While the husband cannot devise the community property contrary to the wife's wishes, nevertheless, if he attempt to do so, and the wife recognizes such disposition by accepting, under such will as devisee, rights she would otherwise not be entitled to,³⁴ she is precluded from disputing the validity of the disposition of her property. When under the terms of the will to accept would be inconsistent with her legal rights, she is put upon her election to take under the will or to claim as a wife under the law.³⁵ She will be held to have so elected where, upon a full knowledge of all the facts, she accepts under the will rights that are not conferred upon her by the law of descent of such property, and where to then repudiate it, and assert her legal rights, would be at variance with the will.³⁶ But to accept property from an estate which she was entitled to under the law, and which was not disposed of by the will, cannot constitute an election, nor will her recognition of the executor of the will have that effect; these things do not result in injury to other legatees.³⁷ To receive property to which she is entitled under the

³⁴*McClary v. Duckworth* (Tex. Civ. App.) 57 S. W. 317; *Lee v. McFarland*, 19 Tex. Civ. App. 292, 46 S. W. 281.

³⁵*Rogers v. Trevathan*, 67 Tex. 406, 3 S. W. 569.

³⁶*Wells v. Petree*, 39 Tex. 420; *Moss v. Helsley*, 60 Tex. 426; *Smith*

v. Butler, 85 Tex. 126, 19 S. W. 1083; *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520; *Martin v. Moran*, 11 Tex. Civ. App. 509, 32 S. W. 904; *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581, 50 S. W. 648.

³⁷*Pryor v. Pendleton*, 92 Tex. 384, 47 S. W. 706, 49 S. W. 212.

law of descent, even though the will also directs that it go to her, is not necessarily an election to receive under the will.³⁸ It may be an election to repudiate and take as heir.

§ 163. How Revoked.

“No will in writing made in conformity with the preceding articles, nor any clause thereof or devise therein, shall be revoked except by a subsequent will, codicil, or declaration, in writing, executed with like formalities, or by the testator destroying, canceling, or obliterating the same, or causing it to be done in his presence.³⁹” If a last will and testament was made when the testator had no child living, and wherein any child he may afterward have is not provided for or mentioned, and at his death he leaves a child, or if the wife survives and is *enceinte* of a child which shall be born, such will is declared void, unless such afterborn child dies without having been married and before attaining the age of twenty-one years.⁴⁰ This is the only contingency upon which a will is revoked upon the birth of children to the testator. The statutes providing a means of revoking, and also making provision for children born after the making of the will, excludes the common-law idea that by marriage and birth of issue the will is by implication of law revoked.⁴¹ The revocation must be in one of the ways pointed out by statute, or by the contingency above mentioned.

Where the husband makes deed to the wife, which is “not to take effect” till after his death, the instrument is testamentary, rather than a conveyance, and the husband’s revocation thereof is evidenced by his subsequently deeding it to another.⁴²

³⁸Compare *ante*, § 137.

³⁹Rev. Stat. art. 5337.

⁴⁰*Ibid.* art. 5345.

⁴¹*Morgan v. Davenport*, 60 Tex.

⁴²*De Bajligethy v. Johnson* (Tex. Civ. App.) 56 S. W. 95. See *Phillips v. Phillips* (Tex. Civ. App.) 57 S. W. 59.

CHAPTER XII

GUARDIANSHIPS.

§ 164. Married Women's Power to Act as Guardians.

§ 165. — of the Persons and Estates of Minor Children.

§ 166. Of Insane or Habitual Drunkard. Husband or Wife.

§ 167. Support and Maintenance of Ward.

§ 164. Married Women's Power to Act as Guardians.

The law nowhere incapacitates a married woman, either expressly or impliedly, from acting in the capacity of guardian.¹ On the contrary, in many instances she is specially given the preference of the guardianship of certain individuals, as her insane husband, or child or children of a former marriage. The nature of these statutes is such that it does not import an intention to limit her right to act to those particular cases mentioned. She may do all things necessary to a proper discharge of the duties of her office irrespective of her coverture. She may, jointly with her husband, or without him if he be absent from the state or refuse to join her, execute such bond as guardian as the law requires, and acknowledge the same before any officer authorized by law to take acknowledgments of married women to written instruments; and such bond will bind her separate estate as though she were unmarried. It will not bind her husband as surety, however, unless he sign and be approved as such. And the fact that she is less than twenty-one years of age will render it none the less valid, for by marriage she becomes of age.² She may act as guardian for the person or estate of another, and her powers and duties are the same as those prescribed by general law.

¹Rev. Stat. art. 2585.

²Ibid. arts. 2604, 2605.

§ 165. — of the Persons and Estates of Minor Children.

Where the parents of a minor live together, the father is the natural guardian of the persons of the minor children by the marriage, and is entitled to be appointed guardian of their estates. Where they do not live together, their rights are equal, and the guardianship will be assigned to one or the other according to the circumstances of each case, taking into consideration the interest of the children alone.³

§ 166. Of Insane or Habitual Drunkard, Husband or Wife.

When the court determines that a person is of unsound mind, or an habitual drunkard, the appointment of a guardian of his person and estate is proper, and if such person be married, the wife or husband, if not disqualified, is entitled to the guardianship in preference to all other persons.⁴

When from any cause the estate of such person is without a guardian, and liable to injury or waste, "the county judge shall, upon application, or without application, either in term time or in vacation, appoint some suitable person to take charge of such estate, as receiver, until a guardian can be regularly appointed, and shall make such other orders as may be necessary for the preservation of such estate. Such appointment and orders shall be recorded in the minutes of the court, and shall specify the duties and powers of such receiver, and the provisions of the law governing in the case of a temporary administration upon the estate of a decedent shall govern in the case of a receiver appointed under this article, so far as the same are applicable. If, during the pendency of such receivership, the wants of such minor, person of unsound mind, or habitual drunkard, should require the use of the means of such estate for their subsistence, clothing, or education, the county judge is hereby authorized, and it shall be his duty, upon application or without application, either in term time or in vacation, to appropriate by an order entered upon the minutes of his court, out of the effects of such estate, an amount sufficient for such purpose, said amount to be paid by such receiver upon such claims for the subsistence, clothing, or education as may have been pre-

³Ibid. arts. 2575, 2576.

⁴Ibid. arts. 2583, 2744.

sented to such county judge, and approved, and by him ordered to be paid. If at any time the receiver shall have on hand any money belonging to such estate beyond what may be necessary for the present necessities of the beneficiary of said estate and the current expenses thereof, he may, under the direction of the county judge, loan said money for such length of time as said county judge may direct, for the highest legal rate of interest that can be obtained therefor, in the manner and upon the security and terms provided in article 2640, chapter 9, title 51, of said Revised Civil Statutes."⁵

When information is given the county judge that any person of the county is of unsound mind, or is an habitual drunkard, and is without a guardian, he will, if satisfied that there is good cause for the exercise of his jurisdiction, have such person brought before him to determine whether or not he be of unsound mind or an habitual drunkard, and if so, will proceed immediately to appoint the guardian of his person and estate,⁶ and make orders for the support of his family and education of his children when necessary.⁷

§ 167. Support and Maintenance of Ward.

The husband or wife of one adjudged to be of unsound mind, or an habitual drunkard, is liable for the maintenance and the expenses attending his confinement, where such ward has no estate of his own.⁸

The parent's appointment as guardian of the estate of his minor child does not relieve him of the duty of supporting such child so as to authorize him to charge such minor's estate therefor.⁹

⁵Ibid. art. 2595.

⁶Rev. Stat. arts. 2748, 2749.

⁷Ibid. arts. 2738, 2740.

⁸Moore v. Moore (Tex. Civ. App.)

⁹Ibid. art. 2743. Compare *ante*, §§ 103, 104. 31 S. W. 532.

PART III.



PART III.

PROPERTY.

CHAPTER XIII.

COMMUNITY PROPERTY.

- § 168. Spanish Civil Law.
- § 169. Act of 1840.
- § 170. Act of 1848; Present Statutes.
- § 171. Nature of Wife's Interest.
- § 172. Mere Agreements Cannot Change.
- § 173. Nor Subsequent Legislative Acts.
- § 174. Her Interest Not Alienable.
- § 175. Her Title, whether Legal or Equitable.
- § 176. Extent of Her Interest in.
- § 177. — Living Apart.
- § 178. In Cases of Meretricious Unions.
- § 179. Presumptions.
- § 180. — Deed Taken in Wife's Name.
- § 181. — Comment.
- § 182. — How Rebutted; Burden of Proof.
- § 183. — Insufficient Proof; Instances.
- § 184. Further Definition; Includes What.
- § 185. — Increase of Wife's Property.
- § 186. — Her Personal Earnings.
- § 187. — Crops Grown upon Her Land.
- § 188. — Rents and Hire of Her Separate Property.
- § 189. — Timber, Soil, etc., Taken from Her Land.
- § 190. — Profits from Her Investments.
- § 191. — Interest on Her Money.
- § 192. — Property Purchased on Credit, When.
- § 193. — Damages for Injury to Person of Either Spouse.
- § 194. — Damages to Community Property.
- § 195. — Insurance Policy upon Life of Husband or Wife, When.
- § 196. — Penalties, etc., under the Statute.
- § 197. — Property Acquired by Limitation.
- § 198. — Colonial Grants to Families.
- § 199. — Pre-emption Homesteads.
- § 200. — Bounty Warrants and Land Certificates.
- § 201. Changes and Mutations.
- § 202. Liability of Community for Community Debts.
- § 203. For Antenuptial Debts of Spouses.
- § 204. For Individual Debts Contracted during Marriage.
- § 205. Community Entitled to Reimbursement, When.
- § 206. And must Reimburse, When.
- § 207. Sales, Conveyances, and Encumbrances.
- § 208. Conflict of Laws.

§ 168. Spanish Civil Law.

The Spanish civil law, from which in a large degree sprung our community system, recognized marriage as a species of partnership between the husband and wife with respect to the community property, in which each owned an equal share or interest, but which property was committed to the care and management of the husband. His control was for the community, and any attempted disposition with intent to defraud the wife or prejudice her interests was void. To this estate belonged all the property acquired by the spouses by their labor, industry, office, or profession, the income of their individual property, and the gains from their money, although the capital remained the separate property of its owner. The presumption was in favor of the community, although either spouse might prove the separate character of the property.¹ The acquisitions, after marriage, except that acquired by gratuitous titles such as by inheritance or donation, and except that taken in exchange for other property belonging to one of the spouses, became a part of the ganancial goods, whether the same was taken in the name of the husband or the wife.² This included the fruits, rents, etc.³ The community of goods ceased in several ways, as by death of one of the spouses, divorce, confiscation of the goods of one, and by the renunciation of the ganancial goods by the wife. She might thus renounce the community before, during, or after the dissolution of the marriage.⁴ The death of the wife entitled the surviving husband to a free right to the use and disposition of one half of the community gains, without any liability to their children for any part thereof, provided he did not deprive them of their portion.⁵ The wife lost her matrimonial gains in the following cases: When she had been guilty of adultery; when she had abandoned her husband without his consent; and when she had joined some religious society and therein married or committed adultery.⁶ So, also, t

¹Schmidt's Civil Law, arts. 43 *et seq.*

²Clopper v. Sage, 14 Tex. Civ. App. 296, 37 S. W. 363.

³Scott v. Maynard, Dallam (Tex.) 548; Cartwright v. Cartwright, 18

Tex. 626; Yates v. Houston, 3 T. 433; Parker v. Chance, 11 Tex. 51.

⁴Schmidt's Civil Law, arts. 56 *seq.*

⁵Ibid. art. 67.

⁶Ibid. art. 68.

widow forfeited her share of such gains by leading a dissolute life.⁷

§ 169. Act of 1840.

By the act of 1840, commonly known as the act adopting the common law in this state, then a republic, the marital rights were more clearly defined. Hitherto they had been administered according to the usages of the civil law in so far as those usages were applicable to our changed conditions. With reference to what shall compose the community, that act provided: "That all property which the husband or wife may bring into the marriage, except land and slaves and the wife's paraphernalia, and all the property acquired during the marriage, except such land or slaves, or their increase, as may be acquired by either party by gift, devise, or descent, and except, also, the wife's paraphernalia, acquired as aforesaid, and during the time aforesaid, shall be the common property of the husband and wife, and, during the coverture, may be sold or otherwise disposed of by the husband only."⁸ The rights of the community were greater under this act than ever before or since. Prior to its enactment, and ever since its repeal in 1848, the property owned by either spouse before marriage, as also that acquired during marriage by gift, devise, or descent, was a part of the separate estate.⁹ Under that law the personal property of the wife brought into the marriage, and its increase, became community; ¹⁰ only the increase of her slaves among the acquisitions during marriage remained her separate property.¹¹

§ 170. Act of 1848; Present Statutes.

By the act of March 13, 1848, a great change was made in the law with reference to the community property. It omitted from its provisions certain property mentioned in the act of 1840, viz., the property which the husband or wife might bring into

⁷Ibid. art. 69.

⁸Paschal's Dig. art. 4641, n. 1048,
§ 4: Say. Ear. L. of Tex. art. 707, §
4.

⁹Fitts v. Fitts, 14 Tex. 443.
M. W.—12.

¹⁰Portis v. Parker, 22 Tex. 699;
Bateman v. Bateman, 25 Tex. 270.

¹¹Cartwright v. Cartwright, 18
Tex. 626.

the marriage; and read as follows: "All property acquired by either husband or wife during the marriage, except that which is acquired in the manner specified in the second section of this act, shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only." The section 2 referred to defined the separate property of the spouses to be all property, both real and personal, owned or claimed by them before marriage, and that acquired afterwards by gift, devise, or descent, as, also, the increase of all lands or slaves thus acquired. And the act as modified by subsequent codifiers is our present statute upon the question, and is as follows: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only."¹²

§ 171. Nature of Wife's Interest.

It is the cherished policy of our laws to regard the married union as a species of partnership in which each partner may own a separate or individual estate, and at the same time share equally in the common gains or acquisitions. It clearly defines what property shall enter into this common fund, and what property, and to what extent, shall remain the separate property of each partner. No effort is made to vest a greater portion of these joint acquisitions in one spouse than in the other. The wife's rights, in point of ownership, are in every respect the equal of those of her husband. They are identical; in short they own the estate in common. And why not? If the wife's right to own property at all be recognized, it would certainly seem: that her claims to an equal interest in the common gains of herself and husband are the most just. True, the husband is the active, managing partner of the union, who by common consent is expected to find a support for his family; yet the wife's duties, and burdens, in behalf of the husband and family, are none the less important. Their duties and obligations are in the highest sense reciprocal. They vary in detail, but herein lies their

¹²Rev. Stat. art. 2968.

mutual advantage to each other. The only perceivable difference between their rights in the common property is that the right of management and disposition is given exclusively to the husband; hers is an equal right to the property itself, its beneficial use, subject to the husband's power of control and disposition for their common good. While he is permitted this seeming advantage, he is likewise charged with a corresponding burden,—that of personal liability for the support of his wife. His exclusive control, of course, lasts no longer than the coverture, and while his liabilities as head of the family last. It can make no difference whether the acquisition is in matter of fact the result of the husband's or the wife's labor, skill, or investment; the law will not inquire into these things. Whatever is acquired by either or both, in whatever manner acquired, with the exceptions stated, becomes at once the common property of both in which the interest of the wife is equal to that of her husband.

§ 172. **Mere Agreements Cannot Change.**

And this interest is cast upon her by virtue of the law itself, and is in no sense the result of contract. Her statutory rights in the community property cannot be altered by mere agreements between herself and husband, made subsequent to marriage, and thus converted from community into separate estate.¹³ Such agreements, if permitted, would be subversive of our marital-rights statutes,¹⁴ and work untold mischief to the rights of creditors and other persons dealing with the husband or property. What is here said has no reference to the well-recognized right of the husband to make to his wife a donation of his interest in the community property when such a thing can be done without injury to the rights of others. This is doing with his property, then *in esse*, as he has a right to do; but he cannot make such a disposition of the community, whether then *in esse* or to be acquired, to the prejudice of others. The only class of agreements which will affect the community property is the contract of settlement, noticed under the head of

¹³Cox v. Miller, 54 Tex. 16; Green v. Ferguson, 62 Tex. 525; Miller v. Marx, 65 Tex. 131.

¹⁴Rev. Stat. arts. 2847–2850.

another; and it has never been thought that a legislature could take one person's property and give it to another.

§ 174. Her Interest Not Alienable.

It may be said that during the marriage the husband and wife are jointly seised of the community property, with a half interest remaining over to the survivor. This interest runs current with the estate, and becomes separable only upon the dissolution of the marriage. It is a blended and common interest in the whole, and neither exists without the other. They are counterparts each of the other. It cannot be said that one half of the community belongs separately to the wife. If this were so the husband could not charge or convey it, and would not be liable for the community debts. There would in such event be only the two estates pertaining to every marital union,—the husband's and the wife's. The common property cannot be thus divided. The moment the interest of one spouse in the community property is separated from the other, the property ceases to be common. If the entire interest of the wife could be alienated, a part thereof could likewise be disposed of, thus creating an estate in the remainder incongruous with the law. So that it follows that any species of alienation by the wife of her interest in the community would be disastrous to that estate, and would frustrate the end sought to be attained by the law and be altogether inconsistent with the nature of her community interest. The law contemplates that the beneficial title of community property shall pass to the community, regardless of in whom the naked legal title shall be vested, and to permit the wife to alienate her interest would seriously embarrass the husband in the exercise of his statutory right of disposition.

§ 175. Her Title, Whether Legal or Equitable.

By an examination of the various acts defining the common property of the husband and wife, it will be seen that no provision is made for the form of the conveyance, where a conveyance is by law required, but all seek only to declare in whom the beneficial interest or equitable title shall vest. It is declared that "all property acquired by" the husband and wife during the

marriage shall be deemed the common property, etc.]
 tinction is made between property acquired by the husba
 that acquired by the wife, nor between that conveyed to t
 band and that conveyed to the wife. It, then, can make
 ference whether the conveyance be to the husband or to th
 or to both, the interest of the husband and the wife will
 same. But this interest or title is an equitable or benefici
 for the legal title, to be consistent with our registratio
 which require conveyances to be recorded with the objec
 posing the chain of the legal title to the inspection of purc
 rests in the person to whom the conveyance is made.¹⁸
 conveyance by one having the legal title to one without
 of existing equities will be upheld. This will bring us
 seeming difficulty, it must be confessed. For where the
 ance of the community is taken in the name of the wife,
 confronted with the anomalous situation that the benefici
 is in the community, while under the decisions the wif
 the legal title, and yet under our statute the husband, &
 she, is the only person who has the power to dispose of it.
 his deed conveys the title, both legal and equitable—an i
 of a person whose title is only beneficial conveying as v
 legal title. Would it not be more reasonable to say tha
 the beneficial title was enjoyed by the community the leg
 in all cases rested in the husband, the sole member of th
 munity capable of conveying, whether the conveyance be
 the wife, or to both? Such would be more consistent w
 real nature of the transaction, and with our statutes auth
 the husband alone to convey. At any rate, if the conveyar
 the wife, and she holds the legal title, she cannot convey
 husband's conveyance is required, and her joining ther
 parts no additional force to it.

§ 176. Extent of Her Interest in.

With certain exceptions provided by law, the com

¹⁸Edwards v. Brown, 68 Tex. 329, 909; Saunders v. Isbell, 5
 5 S. W. 87, S. C. 4 S. W. 380; Hill v. App. 513, 24 S. W. 307; A
 Moore, 62 Tex. 610; Kirby v. Moody, Hodge, 20 Tex. Civ. App. 2
 84 Tex. 201, 19 S. W. 453; Patty v. W. 714.
 Middleton, 82 Tex. 586, 17 S. W.

property is subject to the debts of the husband and wife contracted during marriage. It is also liable for the debts of either the husband or wife contracted before marriage, and the wife's interest therein is, in a sense, charged with these debts; that is, her rights therein are subordinate thereto. The husband may, during marriage, convey or charge it, and her consent is not necessary. She has no protection short of his fraud. He can, if he sees fit, use it to pay his individual debts; he may sell it and squander the proceeds, and her interest passes to the purchaser or debtor as the case may be. The law makes him a sole trustee of this fund for the benefit of the community, whose actions, less than fraudulent, are valid. He may thus render his separate estate liable for a reimbursement to her, but this is the extent of her redress.

§ 177. — **Living Apart.**

A marriage once solemnized under our laws continues to exist till an end is put to it by the death of one or both the parties, or by a decree of divorce. And while the community rights of husband and wife are founded upon the reciprocal relations they sustain to each other, during the marital relation, no court since our emergence from under the Spanish law has ever attempted, so far as we are aware, to cast a rule defining what act or acts of the wife, whether abandonment or other conduct, will disentitle her to her rights as a wife in the community earnings or those of her husband. The conjugal partnership cannot be said to be "established upon the basis of equality of contribution of labor or capital by the parties to it, and it exists and is enforced upon principles which recognize perfect union and equality of enjoyment of gains, and the division thereof, regardless of all inequalities induced by accident, misfortune, disease, idleness, or even wasteful habits of one or the other of the spouses." Her status as a wife is fixed by law, and her rights clearly defined, and that status exists, and those rights remain, so long as her coverture continues, except in those cases where her conduct might be inconsistent with a particular right conferred upon her. Our legislature has never seen fit to limit her rights as a wife to the enjoyment of an interest in the community for such time only as she might live and cohabit with her husband. What-

ever of uncongeniality, bickerings, quarrels, or separations there may be, these are subjects affecting his or her right to a judicial termination of the relation, but should not in any manner affect the property rights of the parties that are dependent upon the existence of the marriage relation for their existence. So that in the absence of legislative action in the matter, it is safe to say that the mere withdrawal of the wife from the husband, and continuance to live apart from him, however unjustifiable and improper her conduct in doing so may be, do not deprive her of her community interest in the community property of herself and husband, nor of interest in the husband's subsequent acquisitions.¹⁹ A different rule was held formerly under the Spanish law.²⁰ The facts and circumstances surrounding a separation may be such as to warrant the conclusion that the husband intended to abandon the wife and to make her a gift of her individual earnings, or the profits and rents of her property and the like, and then he could assert no interest in them. They would not be of the community, upon the theory of gift.²¹

The wife's homestead right is not governed by the same rules as are her community rights. By an unwarranted abandonment of her husband and home she may lose the homestead right.²²

§ 178. In Cases of Meretricious Unions.

The language of Judge Head of our court of civil appeals for the second district, in *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. 154, so aptly discusses this question that it is here given: "It will thus be seen that the strong tendency of our judges in the past has been to hold that property acquired in this state, under our community laws, by a man and woman living together as husband and wife, should belong to them in equal shares, whether they were legally married or not. And why should this not be so, especially when they have attempted to enter into a marriage contract, and believed that they were lawfully husband and wife? In such cases by attempting to enter

¹⁹*Routh v. Routh*, 57 Tex. 589.

²⁰*Ante*, § 168; *Wheat v. Owens*, 15 Tex. 242.

²¹*Queen Ins. Co. v. May* (Tex. Civ. App.) 35 S. W. 829; *post*, § 219.

²²See *post*, §§ 272, 374.

into the marriage contract, they agreed, as far as they had the power to agree, that they would live together as husband and wife, and that all property that they might thereafter acquire should be community property, and belong to them in equal portions. Such is the meaning of the contract they attempted to make, under our law. How, then, can it be said that the property acquired in pursuance of such a contract shall belong to one of the parties more than the other? What right has the husband to all of the property to the exclusion of the wife, or what right has the wife to all of the property to the exclusion of the husband? Suppose a wife so situated should, by her own exertions, acquire property towards which the husband did not contribute anything; would it be contended that this property became his property? How, then, can it be that where the property is acquired by the joint labors of both, each in the eye of the law contributing one half thereto, it shall belong only to the husband? It will not do to refer to decisions in common-law states to sustain the proposition that the woman, under such circumstances, has no right to any part of the property so acquired. In those states, by entering into the marriage contract, she understood that all the property they might acquire while living together should belong to the husband, but in this state she understood that their rights in the property they might accumulate should be equal." Whether this right is given a woman who in good faith attempts a marriage with a man having a living wife or otherwise unable to marry her, as a wife under our marital laws, or allowed her upon the equitable ground that as a joint contributor toward its acquisition she is entitled to one half of it,²³ can make no difference in its results. The court, in the case cited, used both arguments in favor of its decision. In the later case of *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 564, S. C. 88 Tex. 641, 32 S. W. 871, while the question was not before the court, it was said that if such a wife had any interest in such property, it was not that which is given to a wife by the laws regulating marital rights. That was a contest between the real wife and a putative wife over the right to admin-

²³Kinlow v. Kinlow, 72 Tex. 639, 10 S. W. 729.

ister upon the estate of the husband, and the court properly considered the real wife as entitled to the administration. But its holding in no way prevents the application of the principles here announced to putative marriages, even though there be a real husband or wife living. The real wife is entitled to only one half of whatever her husband acquires, not one half of all that he and another person acquires. Then, whether tested by the marital laws or by equitable principles, the wife of a putative marriage, entered into in good faith upon her part, should be entitled to a wife's share of their community gains, and the husband's share might yet be subject to the claims of a first and real wife. But this doctrine cannot be extended to parties who are living in illicit relations with each other, and whose marriage within the knowledge of each is forbidden by law, *e. g.*, a white man and a negro woman.²⁴

§ 179. Presumptions.

All property acquired by either husband or wife during marriage is presumed to belong to their community estate. This wholesome presumption arises, no doubt, from the fact that ordinarily in truth the major part of the property of the husband and wife belongs to the community, and from the further fact that the real ownership is a matter peculiarly within the knowledge of the husband and wife, and any other rule would be inequitable toward creditors and purchasers who deal with the husband, and whose means of knowledge are less ample. As a presumption, this applies to all property acquired by either spouse during marriage, however and from whatever source it may be acquired.²⁵

§ 180. — Deed Taken in Wife's Name.

Since property acquired by either husband or wife during

²⁴Harris v. Hobbs, 22 Tex. Civ. App. 367, 54 S. W. 1085; *post*, § 364.

²⁵Lott v. Keach, 5 Tex. 394; Chapman v. Allen, 15 Tex. 278; Mitchell v. Marr, 26 Tex. 329; Cooke v. Bremond, 27 Tex. 457; Oppenheimer v. Robinson, 87 Tex. 174, 27 S. W. 95;

Augustine v. State (Tex. Crim. App.) 23 S. W. 794; Duncan v. Bickford, 83 Tex. 322, 18 S. W. 598; Stephenson v. Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482; Clift v. Clift, 72 Tex. 144, 10 S. W. 338.

marriage is presumed to be community property, it can make no difference whether the conveyance be in form to the husband, to the wife, or to both. The same presumption obtains. The law fixes the status of the property, and it cannot be affected by the act of the parties in taking the conveyance in the name of the wife. If so taken it is none the less presumptively for the community.²⁶ Her recorded brand upon cattle acquired during the marriage raises the same presumption.²⁷ The deed or other instrument of conveyance may negative this presumption by proper words limiting the property to the sole and separate use of the wife, but unless this is done the presumption of community obtains.²⁸ This is only a presumption, however, for, as between the parties, their heirs or those with notice, the real intention of the parties as to the status of the property may be shown.²⁹

So firmly is this presumption of community established in our system that an innocent purchaser from the husband, of property, title to which stands in the name of the wife, is not even put upon inquiry as to any equities which she may have in the property.³⁰ A deed generally to the wife, when offered in evidence, establishes *prima facie* title in the community.³¹

§ 181. — Comment.

One cannot avoid doubting the wisdom of the very great

²⁶Mitchell v. Marr, 26 Tex. 329; Veramendi v. Hutchins, 48 Tex. 531; McDaniel v. Weiss, 53 Tex. 257; Finn v. Williamson, 75 Tex. 336, 12 S. W. 852; Caffey v. Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65; Schwartzman v. Cabell (Tex. Civ. App.) 49 S. W. 113; German Ins. Co. v. Hunter (Tex. Civ. App.) 32 S. W. 344; Hanover F. Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; Keyser v. Clifton (Tex. Civ. App.) 50 S. W. 957; Scales v. Marshall (Tex. Civ. App.) 60 S. W. 336.

²⁷Rhodes v. Alexander, 19 Tex. Civ. App. 552, 47 S. W. 754. But see

Schneider v. Fowler, 1 Tex. App. Civ. Cas. (White & W.) § 858.

²⁸King v. Holden (Tex.) 16 S. W. 898; Swink v. League, 6 Tex. Civ. App. 309, 25 S. W. 807; Augustine v. State (Tex. Crim. App.) 23 S. W. 794; Rhodes v. Alexander, 19 Tex. Civ. App. 552, 47 S. W. 754.

²⁹Clardy v. Wilson (Tex. Civ. App.) 58 S. W. 52.

³⁰Cooke v. Bremond, 27 Tex. 457; Kirk v. Houston Direct Nav. Co. 49 Tex. 213; Oppenheimer v. Robinson, 87 Tex. 174, 27 S. W. 95; Stiles v. Japhet, 84 Tex. 91, 19 S. W. 450; Gaston v. Wright, 83 Tex. 282, 18 S. W. 576.

³¹Moffatt v. Sydnor, 13 Tex. 628.

“Marriage Settlements,”¹⁵ and these are ante, and not post nuptial agreements. Even as between themselves, these post-nuptial agreements are seldom permitted. For the wife to relinquish her rights in the community to her husband is considered impolitic, and usually void.¹⁶ In some instances they have been upheld. In cases where the agreement is fairly made, and appeals strongly to the conscience of the court, and has been acted upon, it is sometimes more equitable to follow than to disregard it. In *Kellett v. Kellett* (Tex. Civ. App.) 56 S. W. 766, the husband and wife joined in a conveyance of the wife’s separate lands to a trustee, upon the expressed condition that such trustee was to reconvey to the husband, to the end, and for the expressed purpose, of converting such separate property into the community of the husband and wife. In a subsequent action between the husband and wife the court regarded the transaction as an effort to change the status of the property by agreement of the parties through the guise of deeds, and held its status to be unaffected by the attempted conveyance. It was held not to be an intended gift to the husband, which the wife could in law make, for had such effect been given the deeds it would have constituted the property his separate estate, when the purpose was to constitute it community. Had the wife by deed of gift conveyed to her husband a one-half interest in the land, the parties would not yet have owned the whole in community, but their respective portions in their separate rights.

§ 173. Nor Subsequent Legislative Acts.

And for the most obvious reasons when title to property is once by law vested in the husband or wife, it is not within the power of the legislature, by legislative act, to divest it. Such an act would be violative of our organic law.¹⁷ To enact that property then common in its character under the law shall henceforth be separate, or *vice versa*, cannot be distinguished from an effort to divest one of all title to his property, and to vest it in

¹⁵*Post*, chap. XVII.

¹⁶*Proetzel v. Schroeder*, 83 Tex. 684, 19 S. W. 292; *Graham v. Stuve*, 76 Tex. 533, 13 S. W. 381; *Cannon v.*

Boutwell, 53 Tex. 626; *Engleman v. Deal*, 14 Tex. Civ. App. 1, 37 S. W. 652.

¹⁷*Portis v. Parker*, 22 Tex. 699.

another; and it has never been thought that a legislature could take one person's property and give it to another.

§ 174. Her Interest Not Alienable.

It may be said that during the marriage the husband and wife are jointly seised of the community property, with a half interest remaining over to the survivor. This interest runs current with the estate, and becomes separable only upon the dissolution of the marriage. It is a blended and common interest in the whole, and neither exists without the other. They are counterparts each of the other. It cannot be said that one half of the community belongs separately to the wife. If this were so the husband could not charge or convey it, and would not be liable for the community debts. There would in such event be only the two estates pertaining to every marital union,—the husband's and the wife's. The common property cannot be thus divided. The moment the interest of one spouse in the community property is separated from the other, the property ceases to be common. If the entire interest of the wife could be alienated, a part thereof could likewise be disposed of, thus creating an estate in the remainder incongruous with the law. So that it follows that any species of alienation by the wife of her interest in the community would be disastrous to that estate, and would frustrate the end sought to be attained by the law and be altogether inconsistent with the nature of her community interest. The law contemplates that the beneficial title of community property shall pass to the community, regardless of in whom the naked legal title shall be vested, and to permit the wife to alienate her interest would seriously embarrass the husband in the exercise of his statutory right of disposition.

§ 175. Her Title, Whether Legal or Equitable.

By an examination of the various acts defining the common property of the husband and wife, it will be seen that no provision is made for the form of the conveyance, where a conveyance is by law required, but all seek only to declare in whom the beneficial interest or equitable title shall vest. It is declared that "all property acquired by" the husband and wife during the

marriage shall be deemed the common property, etc. No distinction is made between property acquired by the husband and that acquired by the wife, nor between that conveyed to the husband and that conveyed to the wife. It, then, can make no difference whether the conveyance be to the husband or to the wife, or to both, the interest of the husband and the wife will be the same. But this interest or title is an equitable or beneficial one; for the legal title, to be consistent with our registration laws, which require conveyances to be recorded with the object of exposing the chain of the legal title to the inspection of purchasers, rests in the person to whom the conveyance is made.¹⁸ And a conveyance by one having the legal title to one without notice of existing equities will be upheld. This will bring us into a seeming difficulty, it must be confessed. For where the conveyance of the community is taken in the name of the wife, we are confronted with the anomalous situation that the beneficial title is in the community, while under the decisions the wife holds the legal title, and yet under our statute the husband, and not she, is the only person who has the power to dispose of it. And his deed conveys the title, both legal and equitable—an instance of a person whose title is only beneficial conveying as well the legal title. Would it not be more reasonable to say that while the beneficial title was enjoyed by the community the legal title in all cases rested in the husband, the sole member of the community capable of conveying, whether the conveyance be to him, the wife, or to both? Such would be more consistent with the real nature of the transaction, and with our statutes authorizing the husband alone to convey. At any rate, if the conveyance is to the wife, and she holds the legal title, she cannot convey it; the husband's conveyance is required, and her joining therein imparts no additional force to it.

§ 176. Extent of Her Interest in.

With certain exceptions provided by law, the community

¹⁸Edwards v. Brown, 68 Tex. 329, 5 S. W. 87, S. C. 4 S. W. 380; Hill v. Moore, 62 Tex. 610; Kirby v. Moody, 84 Tex. 201, 19 S. W. 453; Patty v. Middleton, 82 Tex. 586, 17 S. W. 909; Saunders v. Isbell, 5 Tex. Civ. App. 513, 24 S. W. 307; Arnold v. Hodge, 20 Tex. Civ. App. 211, 49 S. W. 714.

property is subject to the debts of the husband and wife contracted during marriage. It is also liable for the debts of either the husband or wife contracted before marriage, and the wife's interest therein is, in a sense, charged with these debts; that is, her rights therein are subordinate thereto. The husband may, during marriage, convey or charge it, and her consent is not necessary. She has no protection short of his fraud. He can, if he sees fit, use it to pay his individual debts; he may sell it and squander the proceeds, and her interest passes to the purchaser or debtor as the case may be. The law makes him a sole trustee of this fund for the benefit of the community, whose actions, less than fraudulent, are valid. He may thus render his separate estate liable for a reimbursement to her, but this is the extent of her redress.

§ 177. — Living Apart.

A marriage once solemnized under our laws continues to exist till an end is put to it by the death of one or both the parties, or by a decree of divorce. And while the community rights of husband and wife are founded upon the reciprocal relations they sustain to each other, during the marital relation, no court since our emergence from under the Spanish law has ever attempted, so far as we are aware, to cast a rule defining what act or acts of the wife, whether abandonment or other conduct, will disentitle her to her rights as a wife in the community earnings or those of her husband. The conjugal partnership cannot be said to be "established upon the basis of equality of contribution of labor or capital by the parties to it, and it exists and is enforced upon principles which recognize perfect union and equality of enjoyment of gains, and the division thereof, regardless of all inequalities induced by accident, misfortune, disease, idleness, or even wasteful habits of one or the other of the spouses." Her status as a wife is fixed by law, and her rights clearly defined, and that status exists, and those rights remain, so long as her coverture continues, except in those cases where her conduct might be inconsistent with a particular right conferred upon her. Our legislature has never seen fit to limit her rights as a wife to the enjoyment of an interest in the community for such time only as she might live and cohabit with her husband. What-

ever of uncongeniality, bickerings, quarrels, or separations there may be, these are subjects affecting his or her right to a judicial termination of the relation, but should not in any manner affect the property rights of the parties that are dependent upon the existence of the marriage relation for their existence. So that in the absence of legislative action in the matter, it is safe to say that the mere withdrawal of the wife from the husband, and continuance to live apart from him, however unjustifiable and improper her conduct in doing so may be, do not deprive her of her community interest in the community property of herself and husband, nor of interest in the husband's subsequent acquisitions.¹⁹ A different rule was held formerly under the Spanish law.²⁰ The facts and circumstances surrounding a separation may be such as to warrant the conclusion that the husband intended to abandon the wife and to make her a gift of her individual earnings, or the profits and rents of her property and the like, and then he could assert no interest in them. They would not be of the community, upon the theory of gift.²¹

The wife's homestead right is not governed by the same rules as are her community rights. By an unwarranted abandonment of her husband and home she may lose the homestead right.²²

§ 178. In Cases of Meretricious Unions.

The language of Judge Head of our court of civil appeals for the second district, in *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. 154, so aptly discusses this question that it is here given: "It will thus be seen that the strong tendency of our judges in the past has been to hold that property acquired in this state, under our community laws, by a man and woman living together as husband and wife, should belong to them in equal shares, whether they were legally married or not. And why should this not be so, especially when they have attempted to enter into a marriage contract, and believed that they were lawfully husband and wife? In such cases by attempting to enter

¹⁹*Routh v. Routh*, 57 Tex. 589.

²⁰*Queen Ins. Co. v. May* (Tex. Civ.

²¹*Ante*, § 168; *Wheat v. Owens*, 15 Tex. 242.

App.) 35 S. W. 829; *post*, § 219.

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into the marriage contract, they agreed, as far as they had the power to agree, that they would live together as husband and wife, and that all property that they might thereafter acquire should be community property, and belong to them in equal portions. Such is the meaning of the contract they attempted to make, under our law. How, then, can it be said that the property acquired in pursuance of such a contract shall belong to one of the parties more than the other? What right has the husband to all of the property to the exclusion of the wife, or what right has the wife to all of the property to the exclusion of the husband? Suppose a wife so situated should, by her own exertions, acquire property towards which the husband did not contribute anything; would it be contended that this property became his property? How, then, can it be that where the property is acquired by the joint labors of both, each in the eye of the law contributing one half thereto, it shall belong only to the husband? It will not do to refer to decisions in common-law states to sustain the proposition that the woman, under such circumstances, has no right to any part of the property so acquired. In those states, by entering into the marriage contract, she understood that all the property they might acquire while living together should belong to the husband, but in this state she understood that their rights in the property they might accumulate should be equal." Whether this right is given a woman who in good faith attempts a marriage with a man having a living wife or otherwise unable to marry her, as a wife under our marital laws, or allowed her upon the equitable ground that as a joint contributor toward its acquisition she is entitled to one half of it,²³ can make no difference in its results. The court, in the case cited, used both arguments in favor of its decision. In the later case of *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 564, S. C. 88 Tex. 641, 32 S. W. 871, while the question was not before the court, it was said that if such a wife had any interest in such property, it was not that which is given to a wife by the laws regulating marital rights. That was a contest between the real wife and a putative wife over the right to admin-

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ister upon the estate of the husband, and the court properly considered the real wife as entitled to the administration. But its holding in no way prevents the application of the principles here announced to putative marriages, even though there be a real husband or wife living. The real wife is entitled to only one half of whatever her husband acquires, not one half of all that he and another person acquires. Then, whether tested by the marital laws or by equitable principles, the wife of a putative marriage, entered into in good faith upon her part, should be entitled to a wife's share of their community gains, and the husband's share might yet be subject to the claims of a first and real wife. But this doctrine cannot be extended to parties who are living in illicit relations with each other, and whose marriage within the knowledge of each is forbidden by law, *e. g.*, a white man and a negro woman.²⁴

§ 179. Presumptions.

All property acquired by either husband or wife during marriage is presumed to belong to their community estate. This wholesome presumption arises, no doubt, from the fact that ordinarily in truth the major part of the property of the husband and wife belongs to the community, and from the further fact that the real ownership is a matter peculiarly within the knowledge of the husband and wife, and any other rule would be inequitable toward creditors and purchasers who deal with the husband, and whose means of knowledge are less ample. As a presumption, this applies to all property acquired by either spouse during marriage, however and from whatever source it may be acquired.²⁵

§ 180. — Deed Taken in Wife's Name.

Since property acquired by either husband or wife during

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marriage is presumed to be community property, it can make no difference whether the conveyance be in form to the husband, to the wife, or to both. The same presumption obtains. The law fixes the status of the property, and it cannot be affected by the act of the parties in taking the conveyance in the name of the wife. If so taken it is none the less presumptively for the community.²⁶ Her recorded brand upon cattle acquired during the marriage raises the same presumption.²⁷ The deed or other instrument of conveyance may negative this presumption by proper words limiting the property to the sole and separate use of the wife, but unless this is done the presumption of community obtains.²⁸ This is only a presumption, however, for, as between the parties, their heirs or those with notice, the real intention of the parties as to the status of the property may be shown.²⁹

So firmly is this presumption of community established in our system that an innocent purchaser from the husband, of property, title to which stands in the name of the wife, is not even put upon inquiry as to any equities which she may have in the property.³⁰ A deed generally to the wife, when offered in evidence, establishes *prima facie* title in the community.³¹

§ 181. — Comment.

One cannot avoid doubting the wisdom of the very great

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²⁸*King v. Holden* (Tex.) 16 S. W. 898; *Swink v. League*, 6 Tex. Civ. App. 309, 25 S. W. 807; *Augustine v. State* (Tex. Crim. App.) 23 S. W. 794; *Rhodes v. Alexander*, 19 Tex. Civ. App. 552, 47 S. W. 754.

²⁹*Clardy v. Wilson* (Tex. Civ. App.) 58 S. W. 52.

³⁰*Cooke v. Bremond*, 27 Tex. 457; *Kirk v. Houston Direct Nav. Co.* 49 Tex. 213; *Oppenheimer v. Robinson*, 87 Tex. 174, 27 S. W. 95; *Stiles v. Japhet*, 84 Tex. 91, 19 S. W. 450; *Gaston v. Wright*, 83 Tex. 282, 18 S. W. 576.

³¹*Moffatt v. Sydnor*, 13 Tex. 628.

length to which our courts have indulged this presumption of community, especially in some of the cases where the conveyance has been taken in the name of the wife. A presumption of law is indulged upon the theory that it is most probably in keeping with the truth of the facts upon which it is based. A thing is presumed to be true, where presumptions are indulged at all, because it most likely is true, according to the ordinary experience and observation of men. That acquisitions made during marriage are community is the rule, that they are separate is the exception; hence the proper presumption that all are community. The husband is the head of the community, and the only one authorized to convey or hold property for the community; hence it is proper to presume that all conveyances to him during marriage are for the community. The wife cannot control the community, nor convey it. She is not the lawfully recognized manager of that estate; hence a conveyance to her for the community is out of the ordinary way of transaction with that estate, and ought not be presumed to be for the community. Besides it comports with the experience and observation of all men that conveyances are made to the wife only in those cases where the parties intend that she shall have some separate interest. Why should the law indulge a presumption not in keeping with the facts as they most probably are, but opposed to them? How can the law say that a purchaser from the husband, of land, the title to which stands upon the record in the name of the wife, is not even thereby put upon inquiry as to her equities, when in point of fact such a state of things would cause even the most indifferent purchaser to suspect her rights? But it is probably idle to question the correctness of such doctrine, since few questions are better supported by frequent decisions than is this. Property rights have become settled under it, and much harm might come from a decision overturning it.³²

§ 182. — How Rebutted; Burden of Proof.

The effect of this, like all other legal presumptions, is subject to be overcome by proper evidence, and whatever tends to show that such property is not in fact community, but separate in

³²Compare *post*, § 240.

character, is, as between the parties and their privies, admissible for such purpose. This presumption makes only a prima facie case in favor of the community, which must prevail in absence of contrary proof.³³ In all cases where this presumption obtains, he who asserts the separate character of property has the burden of proving it,³⁴ whether it be the wife or the husband.³⁵ This is only a reasserting of the familiar principle and rule of evidence, that the burden of proof is upon him who holds the affirmative of the issue. If the conveyance be to the wife, and recite that it is to her sole and separate use, or contain words of similar import, there is no presumption that the property belongs to the community, but it is prima facie her separate estate, and the burden of tracing into the purchase funds belonging to the community is again upon the party asserting such community character and assailing the truth of the recitals.³⁶

§ 183. — Insufficient Proof; Instances.

In the nature of things, what evidence will, and what will not, be sufficient to rebut the legal presumption arising in cases such as we have under discussion, is not capable of exact definition or statement. It is a question for judge or jury, as any other question of fact.

In *Parker v. Chance*, 11 Tex. 513, the transfer by the husband of community property to a stranger with directions to reconvey to the wife was held not to be sufficient. It was no more

³³*Rhodes v. Alexander*, 19 Tex. Civ. App. 552, 47 S. W. 754.

³⁴*Love v. Robertson*, 7 Tex. 6; *Huston v. Curl*, 8 Tex. 239; *Rose v. Houston*, 11 Tex. 324; *Chapman v. Allen*, 15 Tex. 278; *Higgins v. Johnson*, 20 Tex. 389; *Dunham v. Chat-ham*, 21 Tex. 231; *Smith v. Boquet*, 27 Tex. 507; *Cooke v. Bremond*, 27 Tex. 457; *Tucker v. Carr*, 39 Tex. 98; *Johnson v. Burford*, 39 Tex. 242; *Epperson v. Jones*, 65 Tex. 425; *ante*, § 146; *Nixon v. Wichita Land & Cattle Co.* 84 Tex. 408, 19 S. W.

560; *Smith v. Bailey*, 66 Tex. 553, 1 S. W. 627; *Presidio Min. Co. v. Bullis*, 68 Tex. 581, 4 S. W. 860; *Duncan v. Bickford*, 83 Tex. 322, 18 S. W. 598; *Clafin v. Pfeiffer*, 76 Tex. 469, 13 S. W. 483.

³⁵*Osborn v. Osborn*, 62 Tex. 495.

³⁶*Evans v. Purinton*, 12 Tex. Civ. App. 158, 34 S. W. 350; *McCutchen v. Purinton*, 84 Tex. 603, 19 S. W. 710; *Purinton v. Gunter*, 3 Tex. Civ. App. 525, 22 S. W. 1008; *Swink v. League*, 6 Tex. Civ. App. 309, 25 S. W. 807.

than directing title to be again made to the husband, the other partner in the marital copartnership.

Where the wife had never been in the state, that her husband had made frequent inquiries about property for the purpose, as he said, of investing her money; that the grantor of the property in controversy and the husband were very intimate, the latter being the clerk, boarder, assistant, and confidential friend of the former,—all these amounted, the court said, to nothing to rebut the presumption of law that the property was community property.³⁷

That at the marriage the husband had much money, and the wife nothing, and that during the marriage relation the parties decreased in fortune, making nothing, without explicitly tracing the purchase money or consideration to the separate property of the husband, will not rebut this presumption.³⁸ Again, that the property was purchased during marriage, and possessed by the husband at her death; that the wife, at marriage, had property invested in another state, which was subsequently reinvested in Texas, mostly in homestead, recognized as common property; and that part of the property claimed was made by the husband in such a way as to make it common property,—are not sufficient.³⁹ So, too, where a bond for title was taken to property by the husband before marriage, but none of the purchase money paid until after marriage, the taking of such bond does not affect the presumption that the land was community.⁴⁰ And again, this presumption is not overcome by evidence that, prior to his second marriage, the husband bought a factory with community money of the first marriage, for a sum about equal to the aggregate consideration of the lots in controversy, and that this factory was in his possession, and earned large profits, during the early part of his second marriage, but a few years later, and before the consideration of the lots was paid, was not in his possession.⁴¹ Anything falling short of clear and satisfactory proof to the contrary will not prevail against the presumption

³⁷Mitchell v. Marr, 26 Tex. 329.

³⁸Schmeltz v. Garey, 49 Tex. 49.

³⁹Peet v. Commerce & E. Street R. Co. 70 Tex. 522, 8 S. W. 203.

⁴⁰Hawley v. Geer (Tex.) 17 S. W. 914.

⁴¹Albrecht v. Albrecht (Tex. Civ. App.) 35 S. W. 1076.

that property taken in the name of either spouse during marriage is community.⁴¹

As already stated, if the conveyance properly limits the estate to the wife's separate use, there is no presumption of community. But, "To have and to hold the said land and premises, with the said improvements, appurtenances, rights, privileges, etc., as herein described, to the said Ann M. Stiles, her heirs and assigns, to her proper use, benefit and behoof forever, in fee simple; and I, the said Peter J. Willis, do warrant the said land against all troubles, debts, mortgages, and against the lawful claim or claims of all persons whatsoever, to the said Ann M. Stiles,"—are not such words of limitation as will destroy the presumption.⁴² Nor do the recitals in a deed to a married woman, of the consideration therefor, at "\$400 in hand paid by Catherine Bowman, wife of Charles Bowman," and that the deed is made "with the previous consent of said Charles Bowman," her husband, and the further recital in her deed to a purchaser of the property that the consideration was paid to her, and that the deed was made with the consent of her said husband, in which deed her husband joined and properly acknowledged, destroy such presumption.⁴³ But if the conveyance were not made to the wife until after the death of the husband, the presumption does not apply.⁴⁴

§ 184. Further Definition; Includes What.

While our statutory definition of community property of the husband and wife in this state is happily very terse, it is correspondingly broad. It includes all property acquired by either husband or wife, during marriage, except that acquired by gift, devise, or descent, and except the increase of the separate lands. No limitations whatever as to source of title or means of acquisition are imposed, further than the exceptions noted. Whether the new acquisition be the result of the husband's individual labor, skill, or profession, or of the wife's, the rule is the same.

⁴¹*Scales v. Marshall* (Tex. Civ. App.) 60 S. W. 336.

⁴²*Stiles v. Japhet*, 84 Tex. 91, 19 S. W. 450.

⁴³*Maxson v. Jennings*, 19 Tex. Civ. App. 700, 48 S. W. 781.

⁴⁴*Clark v. Clark*, 21 Tex. Civ. App. 371, 51 S. W. 337.

If the earnings be the fruits, revenues, hire, increase, profits, or interest derived from the individual estate of either spouse, or from the community estate, all come within the scope of the statute. Money borrowed by the husband and wife upon a mortgage of the wife's separate property is community.⁴⁵ But not so, if the husband's credit is in no way involved and repayment is expected to be made from the wife's separate funds.⁴⁶ The term "property" as used in the act is employed in its ordinary legal sense, and includes all things to which that appellation may be given, whether corporeal or incorporeal, real or personal. As said by Chief Justice Hemphill in an early case:⁴⁷ "The definition of community property includes all effects which husband and wife during marriage acquire by a common title, either lucrative or onerous, or which they, or either of them, acquire by purchase or through their labor or industry." And it may be added that it excludes all property not fairly embraced within its statutory definition. As said in a Louisiana case,⁴⁸ the legal import of these words "community property" is a community of property. The comprehensive definition of Escriche of ganancial property, is here given: "It is whatever the husband and the wife acquire during the marriage, and while living together, by a joint lucrative or onerous title, or that which the husband or wife, or either of them, during the marriage and while living together, acquire by purchase or by means of their labor or industry; as also by the fruits of their separate property, which each brings to the marriage; and of that which either acquires for himself by any lucrative title, while the conjugal society subsists. It is the common property of husband and wife, and belongs the half to each of them; although the husband has more separate property than the wife; or the wife more than the husband; although one after marriage acquires more than the other, and although it may be one alone who by toil or commerce accumulates the property." But this definition, ad

⁴⁵Canfield v. Moore, 16 Tex. Civ. App. 472, 41 S. W. 718; Heidenheimer v. McKeen, 63 Tex. 229: *ante*, § 143.

⁴⁶Evans v. Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350.

⁴⁷Smith v. Strahan, 16 Tex. 314.

⁴⁸Bartoli v. Huguenard, 39 La. Ann. 416, 2 So. 196, 6 So. 30.

mirable upon the whole, is not accurate as applied to our community, inasmuch as it limits the community of acquisitions to such time as husband and wife may be living together, which rule of the Spanish law we have never followed;⁴⁹ and further, it includes acquisitions by "joint lucrative title" while a joint donation to the husband and wife may become the separate property of each to the extent of their interests.⁵⁰

Property owned by husband and wife before the marriage, while it contributes its fruits and revenues afterwards, itself forms no part of the community. The community commences at the time of the marriage in all instances, with nothing, and includes, at its dissolution, presumptively everything found in the possession of the surviving spouse, or in the possession of either or both, in cases of judicial dissolution. It springs into existence the moment the marriage is consummated, and its life is coextensive with the existence of the relation. When once established it continues until death or divorce terminates it. It embraces everything acquired by husband and wife or either, by exchange of other community property,⁵¹ or by purchase with community funds, or effects,⁵² or by the individual or joint labors of the spouses. Thus, land conveyed to a husband in consideration that he support the grantor for life is community property,⁵³ and a contract by which husband and wife agreed to take possession of and improve certain land and hold it for ten years, for which they were to receive a certain part, constitutes such part community property, even though the husband dies before the ten years expire, and the wife fulfils the contract.⁵⁴ It embraces the property actually acquired during the marriage, whether the conveyance or other evidence of title be executed before or after the dissolution of the marriage. The status of the property is determined by the time the right to the property accrued, not when the final title is obtained.⁵⁵ If the property

⁴⁹*Ante*, § 177.

⁵⁰*Post*, § 216.

⁵¹*See post*, § 201.

⁵²*Short v. Short*, 12 Tex. Civ. App. 86, 33 S. W. 682.

⁵³*Byars v. Byars*, 11 Tex. Civ. App. 565, 32 S. W. 925.

⁵⁴*Marlin v. Kosmyroski* (Tex. Civ. App.) 27 S. W. 1042.

⁵⁵*Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281.

comes into actual possession after the death of one of the spouses, it must appear that either the deceased or the survivor had some right or interest therein prior to the death of such deceased, in order to impress it with the community character.⁵⁶ But property conveyed to the husband upon a trust, in which neither husband nor wife has any beneficial interest, is not included.⁵⁷ The general trend of our decisions is to hold the community the all-important estate during marriage, and to regard the separate estates as creatures wholly of the statute; and where there is doubt or difficulty in applying the strict letter of that statute to a particular fund or property, the usual course is to declare it community by force of the presumptions previously noticed.

§ 185. — Increase of Wife's Property.

By reference to the Spanish law, it will be observed that the rents, issues, and profits of the separate property of either spouse are community, or ganancial. The language of our statute makes every acquisition community, except those of gift, devise, or descent, and except the "increase of lands" the separate property of one of the spouses. The increase of the wife's property does not come within either of these exceptions, and is consequently part of the community estate. By increase of her property is not meant the enhancement in value of her property due to the fluctuations of the markets, or the augmentation thereof in size, weight, or the like.⁵⁸ for it would be a dangerous doctrine to assert that this represented the increase so as to constitute such property to the extent of such enhanced value community, as it would seriously impair, and might entirely destroy, the *corpus* of the wife's property. Her title would at all times be uncertain, and the extent of her possessions would at all times be dependent upon such a variety of circumstances that no one could at any time be able to say definitely what interest she owned and what interest the community owned in a specific

⁵⁶Figures v. Gregg (Tex. Civ. App.) 39 S. W. 1011; Holloway v. Melhenny Co. 77 Tex. 657, 14 S. W. 240.

⁵⁷Crenshaw v. Harris, 16 Tex. Civ. App. 263, 41 S. W. 391.

⁵⁸Stringfellow v. Sorrells, 82 Tex. 277, 18 S. W. 689.

f property brought by her into the marriage, or acquired
rd by gift, devise, or descent. But the increase that be-
community is such as the offspring from her animals,⁵⁹
rown upon her land,⁶⁰ interest on her investments,⁶¹ the
id butter from her cows, the wool from her sheep, and
. This increase is community for the reason that it is
isition during marriage not reserved by law to the wife,
the further reason that it is supposed to be in a measure
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When the "increase" is such that it is severable from the
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se of land" constitutes the sole exception.⁶²

— Her Personal Earnings.

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No distinction can be made between her earnings and
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common benefit of the community.⁶³ The earnings of
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as do the earnings of the husband's hammer and saw,
orkshop, or store. The husband may not, as at common
n her wages or earnings in his own right, for we have
at they are community, but he only is authorized to suc-
ollect them, and she has no authority to release an obliga-
them without his consent. She may teach,⁶⁵ play, sew,
a servant in any capacity, or follow any trade or profes-
id, if the husband consents, make contracts for such em-
nt, but the wages and earnings are not hers. Of course
ws that she must labor about the household or other af-

rd v. York, 20 Tex. 670;

v. Bateman, 25 Tex. 270;

Light, 81 Tex. 414, 16 S. W.

⁶²See *post*, § 221.

⁶³Johnson v. Burford, 39 Tex. 242.

⁶⁴Morris v. Hastings, 70 Tex. 20,
7 S. W. 649.

⁶⁵Pearce v. Jackson, 61 Tex. 642.

§ 187.

§ 191.

comes into actual possession after the death of one of the spouses, it must appear that either the deceased or the survivor had some right or interest therein prior to the death of such deceased, in order to impress it with the community character.⁵⁶ But property conveyed to the husband upon a trust, in which neither husband nor wife has any beneficial interest, is not included.⁵⁷ The general trend of our decisions is to hold the community the all-important estate during marriage, and to regard the separate estates as creatures wholly of the statute; and where there is doubt or difficulty in applying the strict letter of that statute to a particular fund or property, the usual course is to declare it community by force of the presumptions previously noticed.

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⁵⁶Figures v. Gregg (Tex. Civ. App.) 39 S. W. 1011; Holloway v. McIlhenny Co. 77 Tex. 657, 14 S. W. 240.

⁵⁷Crenshaw v. Harris, 16 Tex. Civ. App. 263, 41 S. W. 391.

⁵⁸Stringfellow v. Sorrells, 82 Tex. 277, 18 S. W. 689.

piece of property brought by her into the marriage, or acquired afterward by gift, devise, or descent. But the increase that becomes community is such as the offspring from her animals,⁵⁹ crops grown upon her land,⁶⁰ interest on her investments,⁶¹ the milk and butter from her cows, the wool from her sheep, and the like. This increase is community for the reason that it is an acquisition during marriage not reserved by law to the wife, and for the further reason that it is supposed to be in a measure the result of the labor, industry, and care of one or both the spouses, as well as of natural growth and increase of her property. When the "increase" is such that it is severable from the *corpus* of her property, it is a new acquisition, and community. "Increase of land" constitutes the sole exception.⁶²

§ 186. — Her Personal Earnings.

The personal earnings of the wife—the reward of her labor, skill, and industry—come within the purview of the statute, and pass like other community property into the hands of the husband. No distinction can be made between her earnings and his; they are common. By marriage they each agree to labor for the common benefit of the community.⁶³ The earnings of the wife's needle or boarding house⁶⁴ belong as much to the community as do the earnings of the husband's hammer and saw, plow, workshop, or store. The husband may not, as at common law, own her wages or earnings in his own right, for we have seen that they are community, but he only is authorized to sue for or collect them, and she has no authority to release an obligation for them without his consent. She may teach,⁶⁵ play, sew, labor as a servant in any capacity, or follow any trade or profession, and, if the husband consents, make contracts for such employment, but the wages and earnings are not hers. Of course it follows that she must labor about the household or other af-

⁵⁹Howard v. York, 20 Tex. 670;
Bateman v. Bateman, 25 Tex. 270;
Blum v. Light, 81 Tex. 414, 16 S. W.
1090.

⁶⁰Post, § 187.

⁶¹Post, § 191.

⁶²See post, § 221.

⁶³Johnson v. Burford, 39 Tex. 242.

⁶⁴Morris v. Hastings, 70 Tex. 26,
7 S. W. 649.

⁶⁵Pearce v. Jackson, 61 Tex. 642.

fairs of herself and husband, and can demand no compensation as wages for it. If property be really a donation or gift to the wife, it does not fall within the rule of community, although it may proceed from a desire to remunerate her for personal favors or services. This is not an acquisition by onerous title, but by gift, or lucrative title.⁶⁶ The husband may release to the wife her earnings by way of a gift, but even this must not be to the prejudice of creditors.⁶⁷

§ 187. — Crops Grown upon Her Land.

Since an early day it has been uniformly held that crops grown upon the wife's land were community property. And even though such crops were grown and produced by the labor of slaves and animals and the use of tools, her own, the result was the same. It has been contended that by the expression "increase of land," to be met with in our constitutions and statutes, was meant the crops grown thereupon, and that therefore crops so grown were separate property of the wife or husband owning the land. Such contention was probably first made in *De Blane v. Lynch*, 23 Tex. 25, where Justice Bell held that such crops became a part of the community property. The decision has been often quoted approvingly, and no court has ever questioned the soundness of the reasoning so far as we are aware.⁶⁸ The cultivated crops are considered to represent more the result of the labor, care, and industry of one or both the spouses than the spontaneous increase of the land, and hence, for that reason above all others, are properly reckoned community.

§ 188. — Rents and Hire of Her Separate Property.

If crops grown upon the wife's land belong to the community, we see no reason why the rents arising from its use should not also belong to that estate; on principle no distinction can be

⁶⁶*Fisk v. Flores*, 43 Tex. 340.

⁶⁷See *post*, § 219.

⁶⁸*Forbes v. Dunham*, 24 Tex. 611; *Cleveland v. Cole*, 65 Tex. 402; *Seligion v. Staples*, 1 Tex. App. Civ. Cas.

(*White & W.*) § 1071; *Conner v. Hawkins*, 66 Tex. 639, 2 S. W. 520; *Hayden v. McMillan*, 4 Tex. Civ. App. 470, 23 S. W. 430.

made. It would seem more reasonable to say that the crops grown upon her land, by the labor of her slaves, and by the use of her animals and tools, would belong exclusively to her, than that the annual or monthly rental of her property was hers. The former comes more nearly within the meaning of "increase of land," whatever that may be, than the latter. Rent is not the increase of land at all. It is a right to a periodical profit therefrom. If the wife owns land, by the statute the husband is entitled to its possession and management, and the community to its use and profits other than its "increase." Rent is but a stipulated amount paid, whether in cash or the products of the soil, for the use of the land, to which the community would otherwise be entitled; furthermore, it is a legitimate inference that such rents arising from the lease of the wife's land are the result in some measure of the care and management of the husband or wife, or both, and for that reason community.⁶⁹

The same reasons exist for holding rents, hire, and compensation for the wife's personal property, community. In *Carr v. Tucker*, 42 Tex. 330, it was decided that the hire for the use of two horses, a wagon and harness, the separate property of the wife, rightfully belonged to the community, and that, too, at a time when the Constitution provided that "the rights of married women to their separate property, real and personal, and the increase of the same, shall be protected." Such hire, like her crops, was held not to be "increase."

§ 189. — Timber, Soil, etc., Taken from Her Land.

It would seem that certainly the spontaneous growth or production of the wife's land—such, for instance, as timber grown upon it or soil and minerals taken from it—would come within the meaning of "increase" of land, and thereby be freed from the impress of community character. It can readily be seen that the crops, rents, and hire of her property represent to a very large extent the skill, care, and labor of one or both the spouses; all of these belong to the community estate. But, even in the

⁶⁹*Rhine v. Blake*, 59 Tex. 240; *Hayden v. McMillan*, 4 Tex. Civ. App. 432. *Small*, 4 Tex. Civ. App. 493, 23 S. W. 479, 23 S. W. 430; *Schepflin v.*

case of such things as are under consideration, in this section, an amount of labor, care, and capital is necessary to be expended before the timber, soil, etc., is segregated from the realty and put into marketable condition. Hence, the acquisition is by onerous title, and belongs to the community. Thus, it has been held that lumber cut by mills owned by the wife, with labor belonging to her, from logs cut from her land, was community property;⁷⁰ and that bricks made upon her separate land, and out of the soil of such land, the husband having nothing to do with their manufacture, and paying no part of the expenses of making them, also were community property.⁷¹ From analogy, hay, fuel, minerals, soil, gravel, rock, sand, and the like, found upon the wife's land, when segregated therefrom by the husband or wife, and the proceeds of such things when sold, would likewise belong to the community.⁷²

§ 190. — Profits from Her Investments.

This phase of the subject has been discussed to some extent,⁷³ and will again be noticed but briefly. Whatever is acquired by husband or wife by speculation with the wife's separate funds is community property. If there be gains they are not acquired by gift, devise, or descent. They are the fortuitous result of a contract, based upon a consideration,—the profits of a venture. They do not represent the enhancement in value of a particular piece of property, but an amount additional to the original fund, for its use or as a compensation for the venture, and for the time and attention bestowed. The purchase of merchandise with the wife's funds, and their sale at a profit, constitute such profits community. They are the compensation for the use of the money and the time and labor of the spouses in the enterprise. The same is true as to profits of speculation with her funds in bonds, stocks, lands, or anything else. Her purchase with her means of a lottery ticket constitutes the profits upon her venture a part of the community funds.⁷⁴ Just how

⁷⁰White v. Lynch, 26 Tex. 195.

⁷³Ante, § 144.

⁷¹Craxton v. Ryan, 3 Tex. App. Civ. Cas. (Willson) § 367.

⁷⁴Dixon v. Sanderson, 72 Tex. 359, 10 S. W. 535.

⁷²Compare *post*, § 221.

far this rule will be carried remains to be seen. It has within it the elements of danger to the wife's separate estate. It would not do to say that every sale of the wife's property at a price in excess of its cost to her, would, to the extent of this increase,—or profit it may be called,—render the proceeds community property. This would lead to no end of confusion, and seriously affect the wife's right to own an estate. For it is well settled that the wife's property may undergo changes and mutations, be sold and the proceeds invested, resold and reinvested, and yet preserve its separate character, so long as she can trace its origin to funds belonging to her. And it is also further well settled that the enhanced value due to an appreciated market, natural growth, increased size, and the like, remains hers, and does not become part of the community as increase of her property. The true rule, then, would seem to be that if the wife's funds be employed in making purchases for the purpose of reselling at an enhanced price, and the object of the transaction be,—not the permanent acquisition,—but the gaining by this means of a sum for the use and employment of her property, the profits thus realized would rightfully belong to the community estate of herself and husband. For there can be no difference between buying and selling merchandise for gain, and buying and selling cattle for the same purpose. It would be strange law that would give to the community the profits in the one case and deny it in the other. The object of both transactions is gain by the investment of the wife's means. That speculations are more frequently made in one class of property than another, does not affect the rule here stated, but might be considered as throwing light upon the probable purpose of making her investments.

§ 191. — Interest on Her Money.

Inseparably connected with the foregoing is interest on the wife's money. It is but another species of profit upon her investments. It is but the hire for the use of her property, and as such acquisition falls properly in the general fund of the family.⁷⁵ In some of the cases interest due by the husband to

⁷⁵Braden v. Gose, 57 Tex. 37; Campbell v. Menczer (Tex. Civ. App.) 35

S. W. 206; Parrish v. Williams (Tex. Civ. App.) 53 S. W. 79.

the wife, for use of her money, has been held to be her separate property, but that is by force of a gift thereof to her by the husband, and must be measured by the rules applicable to gifts. It is hers as between herself and husband.⁷⁶ But she cannot recover interest from him for the use of her property or funds converted by him, in the absence of a promise to pay, since he is in law entitled to this use.⁷⁷

In *Carlisle v. Sommer*, 61 Tex. 124, it was held that, notwithstanding the fact interest accumulated on the separate notes of the wife became community property, still, if the creditor of the community, by his vexatious proceedings and threats, prevented the payment of the note, so that the interest accumulated and remained unpaid, such creditor could not reach the interest thus due so as to subject it to the payment of the husband's debts.

§ 192. — Property Purchased on Credit, When.

If the wife attempts to purchase property upon credit, and in doing so employs in any way the husband's credit, or the community credit, which is the same thing, the new acquisition enters the common fund.⁷⁸ If the husband either expressly or impliedly sanctions her purchase he becomes liable for payment, and the purchase in consequence is his, for the benefit of the community.⁷⁹ She cannot use her husband's credit, nor promise payment out of the community.

§ 193. — Damages for Injury to Person of Either Spouse.

A chose in action accruing to either spouse during coverture by reason of an injury to his person does not fall within either of the exceptions mentioned in the statute defining the community property. Damages for such injuries, when recovered,

⁷⁶*Hall v. Hall*, 52 Tex. 294; *Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 975; *Hamilton-Brown Co. v. Whitaker*, 4 Tex. Civ. App. 380, 23 S. W. 520.

⁷⁷*Parrish v. Williams* (Tex. Civ. App.) 53 S. W. 79.

⁷⁸*Potter v. Kennedy* (Tex. Civ. App.) 41 S. W. 711.

⁷⁹See *ante*, § 142; *post*, § 228.

belong to the community gains.⁸⁰ An apparent exception to this rule is seen in the case of *Nickerson v. Nickerson*, 65 Tex. 281, in which the court holds that damages recovered by the wife for a tort inflicted upon her by her husband and another become her separate property. The opinion, however, expressly recognizes the rule as here stated, but determines that case as "one evidently not within the contemplation of the statute declaring what shall be separate, and what shall be community, property." The exigencies of that case justified the court in holding, in effect, that the husband's tortious act could not confer upon him property rights in the damage to which the wife was clearly entitled.

The injury may be either to the body or mind, as mental suffering will form the basis of an action for damages.⁸¹ If, however, the mental suffering arises after the death of the husband, it is not community.⁸²

The measure of damages for an injury to the person of either spouse, where such injury is permanent, is not based upon the probable duration of life of the person suing, unless such plaintiff be also the person injured, but upon the probable duration of life of the one injured.⁸³

§ 194. — Damages to Community Property.

It is probably a superfluity to add that damages arising from an injury or trespass to the community likewise become community.⁸⁴ So, a recovery for the value of crops destroyed upon the separate lands of either spouse is for the community.⁸⁵ Whether the community property be destroyed or only injured,

⁸⁰*Ezell v. Dodson*, 60 Tex. 331; *Texas C. R. Co. v. Burnett*, 61 Tex. 638; *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407; *Texas & P. R. Co. v. Bailey*, 83 Tex. 19, 18 S. W. 481; *Missouri P. R. Co. v. White*, 80 Tex. 202, 15 S. W. 808; *Bohan v. Bohan* (Tex. Civ. App.) 56 S. W. 959.

⁸¹*Loper v. Western U. Teleg. Co.* 70 Tex. 689, 8 S. W. 600

⁸²*Western U. Teleg. Co. v. Kelly* (Tex. Civ. App.) 29 S. W. 408.

⁸³*International & G. N. R. Co. v. Anthony* (Tex. Civ. App.) 57 S. W. 897.

⁸⁴*Edrington v. Newland*, 57 Tex. 627; *Middlebrook Bros. v. Zapp*, 73 Tex. 29, 10 S. W. 732.

⁸⁵*Texas & St. L. R. Co. v. Reid*, 1 Tex. App. Civ. Cas. (White & W.) § 296.

the recovery would partake, of course, of the nature of the estate which it is intended to replace.

§ 195. Insurance Policy upon Life of Husband or Wife, When.

Akin to the profits realized by the community upon the husband's or wife's investments of the separate or community funds are the proceeds of an insurance policy upon the life of the one or the other, with loss payable to the estate of the insured, or to the community, or as directed by will. An insurance policy is nothing more than a contract,—an undertaking upon the part of the company to pay the face of the policy upon the death of the insured, in consideration of periodical payments of the premium; and this contract or obligation is governed by precisely the same rules applicable to the acquisition of other property during coverture, in determining upon its character as community or separate property. If the husband write his life with proceeds payable to his wife, there is a specific gift of the acquisition to her, and such contract will be omitted from this discussion and noticed elsewhere.⁸⁶ But where the policy is payable to the husband's estate, or to the community (here there could be no dispute), or as directed by insured's will, or its disposition controlled by similar expressions, there is nothing to take it out of the class of acquisitions made during marriage as a profit from a venture or investment. Insurance policies usually possess a cash value at all periods of their existence; reaching their maximum, of course, upon the death of the insured but at all times, unless relieved of its community character by means of a valid assignment or gift, the wife has an interest therein equal to her husband. And it can make no difference whether the premium payments are made from the separate funds of the husband, the wife, or from their joint funds; for the profits of all of these funds belong alike to the community. If the policy were upon the life of the wife it could hardly be considered, in the first place, such a contract as she could in law enter into, without the consent and assistance of her husband and it then becomes the undertaking of the community to pay the premiums, and hence the policy would be of that estate; i

⁸⁶Post, § 227.

upon the life of the husband, and the payments were made out of his separate funds, unless by proper directions it was expressly stipulated that the proceeds were payable to his separate estate, it would still be community, for the profits of his investments are none the less community; and even if such directions were stipulated, in the absence of an acquiescence therein, or outright gift thereof by the wife, it would seem yet to be community; for whatever the husband's intentions upon making an investment of his separate property, the profits arising therefrom belong equally to his wife. We are assuming in the discussion that a contract of insurance represents, or is a transaction involving, the investment of small sums or payments periodically, for which a larger sum may, upon certain contingencies, be demanded, varying in amount according to the contingencies and time of making demand, rather than as a transaction of purchase of a specific and indivisible piece of property, which we deem the correct view. If the latter be the correct view of the transaction, a policy purchased by the husband or wife from their separate funds would, of course, be his or hers, and not community. Where the premium payments are made from the community, however the husband may direct the policy, the proceeds are certainly community. It would be going further than any court has yet sanctioned, to say the husband can use the community funds to augment his own separate estate. His right to dispose is for the benefit of the community, and not for private and individual gain. To permit him to use such for the purchase of an insurance policy upon his life, and make the proceeds payable to his separate estate, is no less than to permit him to make a gift to himself of his wife's interest in the community. If he may so use a part, he may use all. He may give his own, but he cannot give hers to another, much less to himself, without her consent. And in such case it cannot be said that the wife's interest extends only to an interest in the premiums paid for such policy, for she has as much interest in the profits made by the husband's trades as she has in the consideration paid.⁸⁷ Necessarily to a great extent, whether such policy is separate or

⁸⁷Martin v. Moran, 11 Tex. Civ. App. 509, 32 S. W. 904.

community depends upon the circumstances of each case, as the questions of intention, to donate by one to the other, and acquiescence amounting to ratification or estoppel, and other extrinsic matters, may enter into the consideration.

§ 196. — Penalties, etc., under the Statute.

Our statutes provide for the recovery, under certain circumstances, by individuals against certain persons and corporations, of sums of money denominated "liquidated damages," "forfeits," and the like. Notably the provisions of article 3380, permitting any person aggrieved by the violation of a liquor dealer's bond under the statute to sue upon such bond, and to recover the sum of \$500 as liquidated damages for each infraction of the conditions of such bond, etc.; and, in article 4560d, railroad companies refusing or failing to redeem certain coupons or tickets upon presentation, shall forfeit to the holder thereof a sum not less than \$100, nor more than \$500, etc.,—these penalties and forfeitures, accruing in favor of a married woman, would render the recovery community funds. There is nothing in the act making the recovery the separate property of the wife when she is the party aggrieved. It is in the nature of damages for personal injuries, which we have already seen are community in their character.⁸⁸ In case the right inures to the wife under the article first referred to, by reason of a sale to her husband under such circumstances as to give to her a cause of action, the recovery will belong to her in her own separate right.⁸⁹ It is her property rather than the husband's, because, in a measure his own wrong has occasioned the cause of action, and he will not be permitted to profit by it. This is not the reason assigned by the court in the authority cited, but it is nevertheless the true reason. If the recovery belongs to the wife in such case because "the legislature has expressly given the wife the right to sue" for it, as stated in the opinion cited, then the same reason exists for saying that a recovery against a liquor dealer for a sale to her minor child, or for permitting him to enter and remain upon the premises, would likewise be her separate property, for she

⁸⁸Wartelsky v. McGee, 10 Tex. Civ. App. 220, 30 S. W. 69.

⁸⁹Hahn v. Goings, 22 Tex. Civ. App. 576, 56 S. W. 217.

is authorized in these cases also to sue. But it cannot be said that these latter damages belong to the mother rather than to the father of such minor. Her power to sue is not the test, but it is the existence or nonexistence of such facts as render it inequitable for the husband to participate in the recovery.⁹⁰

§ 197. — Property Acquired by Limitation.

The acquisition of property during marriage by limitations—the holding of property as a naked trespasser oftentimes, until by lapse of time the statute declares the possessor to be the owner of it—is most obviously gained in such way as to make it community property, whether the possession be held by the husband, the wife, or by both jointly. The possession of one is the possession of both, and if it were not, the acquisitions of either by such means would be by onerous title, and the fruits thereof community.⁹¹ The title to such property is not acquired, however, until the full period of limitation has run, and until that time, neither spouse has any community or other interest in it.⁹²

A contrary holding is made in *Texas & N. O. R. Co. v. Speights* (Tex. Civ. App.) 59 S. W. 572, where the rule is stated to be “that, when prescription begins before and ends during marriage, the title takes effect as of the time when the prescription began.” But the better reason is with the rule as above stated, for it can hardly be said that property is “acquired” by limitations until the full period of the statute is completed, and where this is during coverture the acquisition should be classed as community.

§ 198. — Colonial Grants to Families.

From the earliest days of our history it has been the policy of our republic and state to foster agriculture and stock raising, and to encourage immigrants to settle within our borders, by making to them liberal donations or grants out of our public domain. The question early arose, whether the grants, in the

⁹⁰See *Nickerson v. Nickerson*, 65 Tex. 281; See also *post*, § 289.

⁹¹*Hurley v. Lockett*, 72 Tex. 262, 12 S. W. 212.

⁹²*Bishop v. Lusk*, 8 Tex. Civ. App. 30, 27 S. W. 306.

form of colonial grants to the head of the family, were the community property of the husband and wife, or belonged separately to him as a pure donation. It has, we believe, upon the soundest reasoning, been properly held that these grants of land by the government to the head of the family, under the ordinary restrictions, were conveyances to him in his representative capacity and because he was the head of a family, and hence such lands were impressed with the community character. Certain office and surveying fees were required to be paid, and, moreover, the family was required to occupy and cultivate the land within a stipulated time,—evidencing a contract, upon sufficient consideration moving to the government, to pay and cultivate upon the part of the settler, and to grant and convey upon the part of the government. The burdens of such acquisitions in point of fact fell quite as heavily upon the wife as upon the husband, and “these grants were in fact dearly purchased by the unparalleled toils and sufferings of both the partners; and the fruits of their labors, under a system of laws where the community interest are protected with such jealous vigilance should be equally distributed.”⁹³ As said in *Marks v. Hill*, 46 Tex. 345: “It is believed that the contemporaneous construction was that the immigration and settlement in the state was the leading consideration of the grant;” and further, in *Boone v. Hulsey*, 71 Tex. 176, 9 S. W. 531: “And the tendency of our decisions has been to hold the doctrine that a certificate, when issued to a man as head of a family, or his heirs, inures to the benefit of the family who came with him to the country; . . . [and] if his wife immigrates with him, it was community property of himself and such wife.”

§ 199. — Pre-emption Homesteads.

Every homestead pre-emption law which has ever existed in

⁹³*Yates v. Houston*, 3 Tex. 433; *Burris v. Wideman*, 6 Tex. 231; *Parker v. Chance*, 11 Tex. 513; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Babb v. Carroll*, 21 Tex. 765; *Wright v. McGinty*, 37 Tex. 733; *Carter v. Wi-e*, 39 Tex. 273; *Cannon v. Mur-*

phy, 31 Tex. 405; *Wimberly v. Pabs*, 55 Tex. 587; *Hodge v. Donald*, 5 Tex. 344; *Caruth v. Grigsby*, 57 Tex. 259; *Porter v. Chronister*, 58 Tex. 53; *Rudd v. Johnson*, 60 Tex. 91; *Manchaca v. Field*, 62 Tex. 135.

our state has prescribed, as an essential prerequisite to a grant, that the land be actually settled and improved. This occupancy is the essential feature—the *sine qua non*—of the whole transaction, and is the key to the determination of the status of the property when acquired. Where husband and wife make an application for a homestead donation, they must first have settled thereon and begun the improvement thereof. This settlement and improvement is their joint act, and the land thus acquired is regarded as the result of their joint efforts and labors. She is regarded as contributing equally with her husband toward its acquisition. It is not a gift, but an acquisition by contract, upon mutual terms and considerations between the state and homesteader.⁹⁴ But here, again, as in acquisition of property by limitations, the parties have no title, either separate or community, until the expiration of the full term of occupancy required by law. All the right which they possess is the inchoate right to remain on the land for the required time, and thus put themselves in a position to demand title; and until such occupancy has been completed no property rights have accrued,⁹⁵ and if before such time the wife dies, no title will descend to her heirs.⁹⁶

§ 200. — Bounty Warrants and Land Certificates.

Bounty warrants or other species of land certificates granted to married men for their services in behalf of the government, or under any other special circumstances, may or may not be community property. The question is generally easy of solution. If the warrant or certificate be granted to the husband as a reward or donation in recognition of his extraordinary valor, services, or the like, it will not be community. And it can make no difference whether the grant was made in consideration of services rendered during or before the coverture; if there was no obligation or promise to remunerate, it would only be a gratui-

⁹⁴*Mills v. Brown*, 69 Tex. 244, 6 S. W. 612.

13 Tex. Civ. App. 70, 25 S. W. 323.

⁹⁵*Mitchell v. Nix*, 1 Posey Unrep. Cas. (Tex.) 126; *Roberts v. Trout*,

⁹⁶*Votaw v. Pettigrew*, 15 Tex. Civ. App. 87, 38 S. W. 215.

tous donation,⁹⁷ precisely the same as pension money paid by the government.⁹⁸ But, on the other hand, if the grant is in pursuance of a promise, or the fulfilment of a legal obligation; or, in other words, is in any way the result of contract with the husband, the title acquired will be by onerous means and hence community.⁹⁹ If a right to such warrant or certificate existed in favor of the husband before marriage it would not be community, although the certificate itself was not issued to him until after marriage.¹⁰⁰ •

§ 201. Changes and Mutations

Property found in the possession of the connubial partnership has upon it the brand of the community, until its separate character is in some way established. If it really be community, it retains that character till the termination of the partnership (it is then no longer, strictly speaking, community property, for there is no community, but the heirs own their respective interests therein in common); or until it is in some way converted into the separate property of one or the other of the spouses, or until it is disposed of by the husband. We have already seen how it may be converted into the separate estate of the partners.¹ If it be sold, or exchanged for other property, the proceeds or property taken in exchange immediately assume the same status as that sold or given in exchange. That received stands in lieu of that given.² It is not necessary to cite authorities upon a proposition so fundamental. It was never contemplated that the community should be denied the right freely to sell or exchange its possessions, upon pain of changing the status of the property if such sales or exchanges were made. To what estate could it be transferred by such a process? Mortgaging the community

⁹⁷Fisk v. Flores, 43 Tex. 340; Ames v. Hubby, 49 Tex. 705; McReynolds v. Bowlby, 1 Posey Unrep. Cas. (Tex.) 452; Nixon v. Wichita Land & Cattle Co. 84 Tex. 408, 19 S. W. 560; Causici v. La Coste, 20 Tex. 269.

⁹⁸Johnson v. Johnson (Tex. Civ. App.) 23 S. W. 1022.

⁹⁹Goldsmith v. Herndon, 33 Tex. 705; Nixon v. Wichita Land & Cattle Co. 84 Tex. 408, 19 S. W. 560.

¹⁰⁰Parker v. Newberry, 83 Tex. 429, 18 S. W. 815; Garner v. Thompson 2 Posey Unrep. Cas. (Tex.) 233.

¹Ante, § 80.

²Clardy v. Wilson (Tex. Civ. App. 58 S. W. 52.

does not affect its status. Even though it be reconveyed to the wife, it will immediately again assume the community character;³ indeed, it would be better to say that by such transaction of conveyance in trust the property never loses its community character.⁴ It is never required of anyone to establish affirmatively that community funds entered into the acquisition of property acquired during the marriage, but this conclusion is aided by the presumption of law that such is the case.

§ 202. Liability of Community for Community Debts.

"The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are especially excepted by law."⁵ The article makes no distinction between debts contracted by the husband and those contracted by the wife. Either may, under certain circumstances, contract for the community. A distinction between individual debts and community debts is not only difficult to draw, but is well nigh worthless when drawn. Generally a community debt may be said to be a debt contracted on behalf of the community, whether by the husband or by the wife; such as the husband's debts for the benefit of the family or community property, and the wife's debts for necessities. For these the community is liable, and, too, regardless of whether the contract prove beneficial to that estate or not. To confine the liability of the community to such debts as result in a benefit to that estate would impose upon the husband and all those dealing with him in the belief that that estate was liable to them for their debts, the necessity, not only of scrutinizing the transaction, but of correctly foretelling whether the transaction would prove advantageous or otherwise. This is not the rule. If the husband's efforts result in gain, the community receives the benefits; if they result in loss, it should likewise share the burdens. The words "contracted during marriage," in the article quoted, are not to be understood as words of limitation, exempting the community from liability from all debts other than those mentioned.

³Ballew v. Casey (Tex.) 9 S. W.
189.

M. W.—14.

⁴Pratt v. Godwin, 61 Tex. 331.
⁵Rev. Stat. art. 2973.

§ 203. For Antenuptial Debts of Spouses.

Since the community estate is so comprehensive, embracing as it does the major part of all earnings, gains, and acquisitions after marriage, the ability of the spouses to accumulate a separate estate is indeed quite circumscribed. All their future earnings go to the community, and are liable for the debts contracted during the marriage. If they were not liable for antenuptial debts, marriage would then become a veritable bankrupt tribunal whereto all debt-ridden persons could flee with the certain assurance that the major part of their property would henceforth be forever protected to them, and they thus practically rendered immune from the demands of their former creditors. But such is not the law. The community is a common fund, liable alike to the creditors of the husband and the wife for their antenuptial debts.⁶ The acquisitions of their joint efforts belong alike to the husband and wife, and, in most instances, constitute almost the entire estate owned by them. Marriage in no way discharges these existing debts, and since it is a rule of law, as well as of morals, that all the property owned by a person, with certain defined exceptions, should be liable to his creditors for his debts, and since the community belongs to the spouses, no valid reason can be given why it should not be liable for these debts. If reduced to a scientific formula, it might be held that, since by marriage the husband in no way becomes liable for the wife's debts as at common law, and since he owns an equal interest in the community property, only the wife's portion of that estate could be taken for her antenuptial debts; and *vice versa* with reference to those of the husband. But we have seen that the spouses do not own a separate estate in the community to the extent of a one half, and that their interests are not severable. The interest of each is not capable of being seized and sold in such manner as to constitute the residue the separate property of one of the spouses. It has never been thought advisable to permit an accounting between them at the instance of a creditor; the law rather recognizes the indivisible character of the com-

⁶Moody v. Smoot, 78 Tex. 119, 14 S. W. 285; Lee v. Henderson, 75 Tex. 190, 12 S. W. 981; Taylor v. Murphy, 50 Tex. 291; Portis v. Parker, 22 Tex. 699.

community estate, and makes it liable generally for all the debts of each of the spouses, and leaves the question of equitable accounting to marital partners themselves, should the necessity ever arise.

204. For Individual Debts Contracted during Marriage.

Fully as great reason exists for holding the community estate liable for the individual debts of the spouses contracted during marriage as for those contracted before. Indeed, the statute uses the very broad language, "their debts contracted during marriage," and it needs no argument to show that this applies to the contracts of the husband and wife. It is not necessary the debt should be respecting the community.⁷ The statute does not so provide. It is liable for the separate debts of each.⁸ This common fund is a source from which all debts of either spouse may be satisfied. Creditors are not concerned with the respective interests of its owners, but upon judgment against the wife are given an option of an execution against the community or her separate estate. Having an individual execution against one of the spouses, they may levy upon the entire community,⁹ or they may, if they see proper, levy only upon and sell the interest of one of the spouses, where the relation of husband and wife no longer exists and the community is consequently at an end.¹⁰ For after dissolution of the marriage their former community property is no longer the marital community, but is held by them as tenants in common.

205. Community Entitled to Reimbursement, When.

The peculiar tenacity with which our courts adhere to the doctrine that acquisitions during marriage are community property leads us to a consideration of the status of such acquisitions when by reason of their nature they are attached to, or form a part of, the wife's separate property in such a way as not to be

⁷Hall v. Hall, 52 Tex. 294.

⁸Rev. Stat. arts. 2970, 2971; Grant

⁹Whittlesey, 42 Tex. 320; Cowan v.

¹⁰O. Nelson Mfg. Co. (Tex. Civ.

App.) 34 S. W. 1045.

⁷Grandjean v. Runke (Tex. Civ. App.) 39 S. W. 945.

⁹Campbell v. Antis, 21 Tex. Civ. App. 161, 51 S. W. 343.

separable therefrom; such as structures, fixtures, and improvements placed upon her land, money and labor expended in making substantial improvements upon her other separate property, community feed and funds employed in fattening her livestock for market, and the like. The difficulty is not so much in deciding what is and what is not community property, but in deciding when and to what extent the separate estates should reimburse the community, and *vice versa*. The community is not entitled to any portion of the *corpus* of the wife's property, but to its fruits, revenues, and profits only. On the other hand, her separate property is not entitled to absorb the community property or any part of it, by way of expenditures for betterment or permanent enhancement of her property. To permit this would be to permit the conversion of the community into the separate property of either spouse as best subserved the purposes of husband and wife, and in the end have the effect of defeating the rights of creditors and heirs of what they would otherwise be justified to receive. It frequently happens that the improvements are such as cannot, because of their nature and the nature of the property improved, be segregated and classed as community property, but become a part and parcel of the thing improved, such as buildings upon the wife's land. In such cases the community is equitably entitled to be reimbursed for the outlay upon her separate property.¹¹ The title to the property still remains in the wife, subject to this equity in favor of the community; but it is not such an equity or right in favor of the husband or the community as that creditors of the husband may seize and execute upon execution.¹² It may be that the husband contemplates a gift of the improvements thus placed upon her land, to the wife. In that event, of course, no claim can be made by the community.

¹¹*Furrh v. Winston*, 66 Tex. 521, 1 S. W. 527; *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281; *Bond v. Hill*, 37 Tex. 626; *Robinson v. Moore*, 1 Tex. Civ. App. 93, 20 S. W. 994; *Rice v. Rice*, 21 Tex. 58; *Cameron v. Fay*, 55 Tex. 58; *Day v. Stone*, 59 Tex. 615; *Clift v. Clift*, 72 Tex. 144, 10 S. W. 338; *Sanburn v. Deal*, 3 Tex. Civ. App. 385, 22 S. W. 192.

¹²*Schwartzman v. Cabell* (Tex. Civ. App.) 49 S. W. 113. See also *Blum v. Rogers*, 71 Tex. 668, 595; *Samuelson v. Bridges*, Tex. Civ. App. 425, 25 S. W. 636; *v. Sprowls* (Tex. Civ. App.) 25 S. W. 657.

for reimbursement. But the claims of creditors may be thus prejudiced. For it is not consonant with fair dealing to permit the husband to make a gift of the community to his wife when to do so will be to deprive others of what they are justly entitled to. If the improvements were placed by the husband for the fraudulent purpose of delaying his creditors, and the wife participated in such fraudulent intent, she might thereby subject her land, along with the improvements, to sale for the satisfaction of such creditors' demands.¹³ But, not participating in such fraud, her land cannot be sold. It does not follow, however, that a gift by the husband of such improvements without such fraudulent intent, or the placing of such improvement without an intention of gift to the wife, would necessarily place them beyond the reach of his creditors. The supreme court, through Justice Brown, in *Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567, intimated very strongly that the courts were not without power to subject such improvements to the demands of creditors. It said: "If the husband intended the house as a gift to the wife, it was void as to existing creditors, and is subject to their debts as if not given to her, unless she shows that when the gift was made he had enough property remaining to pay all of his existing debts. The law will not presume it to be a gift in the absence of evidence to show such intention. We are not prepared to say that a court of equity cannot so adjust the interests of the parties as to fully protect the wife's title to the land and all the benefits derived from it, and, at the same time, give to the creditors the benefit of the property which ought to be applied to the payment of their debts." But in the nature of things it will frequently happen that the expenditures of the community are made in such a way that the improvements or benefits placed upon the separate property cannot be reached. In those cases the community would be equitably entitled to its reimbursement, with an equitable lien upon the property for the charge,¹⁴ but no relief could be given creditors.

But this rule must be accepted with proper limitations. It

¹³*Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567.

¹⁴*Robinson v. Moore*, 1 Tex. Civ. App. 93, 20 S. W. 994.

is not every bestowal of community funds or labor upon the wife's separate property that will charge it with a liability for reimbursement. The husband is charged by law with the possession and control of her property during marriage, and receives the rents, profits, and increase thereof; necessarily he expends community labor in its care, and community funds in its preservation; could it be said that the community should be reimbursed for these? That would be making the wife do those things which it is by law the husband's duty to do, and which by reason of his receiving the rents and profits of her estate he is paid to do. The rule should be that whatever care, attention, or expenditures the husband bestows upon his wife's property by virtue of his marital relation, and consequent duty toward such property, the same being reasonably necessary, will not be a charge there against, but that any expenditures of funds that would otherwise be available to his creditors, beyond those which are reasonably necessary to the proper use and preservation of her property, and which go toward the permanent enhancement of the value of her property at the expense of the community, should be returned by the wife.

§ 206. And must Reimburse, When.

No different rule than that noticed above can be prescribed where the separate estate of the wife has contributed to the community. The identical principle is involved, and equity will require that the community make good upon an accounting the advances and expenditures of the separate estate in its behalf. But it has never been held that the community should reimburse the husband who has commingled his separate property with the community beyond identification.¹⁵ Or, if the husband from his private means advances funds or makes improvements upon the wife's separate estate, the community may be called upon to reimburse him to the extent of her interest therein.¹⁶ Under this and the foregoing section the burden of proving the expendi-

¹⁵Moor v. Moor (Tex. Civ. App.) 112, 11 S. W. 175. See also Harvey v. Cummings, 68 Tex. 599, 5 S. W. 513.
¹⁶Schmidt v. Huppmann, 73 Tex.

tures and improvements as alleged is upon the party asserting it.¹⁷

§ 207. Sales, Conveyances, and Encumbrances.

No question is better settled than that the husband alone can convey the community property. Even this general rule has its exceptions.¹⁸ It makes no difference that the community property stands in the name of the wife,¹⁹ he is the proper and necessary party grantor. Even if he attempts to convey in her name, the conveyance is valid, not because he employs her name, but because he is the only person authorized to dispose, and by this means he assents to the disposition.²⁰ Her consent to his disposition or conveyance is not required, so her joining in the conveyance neither helps nor hinders it.

So, a deed to community land, properly acknowledged by the husband, is good notwithstanding a defective acknowledgment of the wife.²¹ Even though the husband attempts to convey by virtue of his wife's power of attorney, the community property standing in her name, the conveyance is upheld as his act, and no validity is imparted to it by such power of attorney.²² The power to dispose, given by statute, includes the power to encumber by mortgage or otherwise, and the wife's assent is unnecessary.²³ The disposing power is with the husband, and purchasers not *mala fide* are protected in dealing with him. He may sell it for the purpose of paying a community debt, and in such case the question of innocent purchaser cannot arise,²⁴ or he may sell it for the purpose of paying his or his wife's individual ante or post nuptial debt. It may be taken in execution for these. Why may it not be voluntarily conveyed by him for such purposes? His sole conveyance is sufficient whether the

¹⁷Welder v. Lambert, 91 Tex. 510, 44 S. W. 281; *ante*, § 38.

¹⁸*Ante*, § 116.

¹⁹Clopper v. Sage, 14 Tex. Civ. App. 296, 37 S. W. 363.

²⁰Schmick v. Bateman, 77 Tex. 326, 14 S. W. 22; Hardin v. Sparks, 70 Tex. 429, 7 S. W. 769.

²¹Bassett v. Martin, 83 Tex. 339, 18 S. W. 587.

²²Dooley v. Montgomery, 72 Tex. 429, 2 L. R. A. 715, 10 S. W. 451.

²³McKinney v. Nunn, 82 Tex. 44, 17 S. W. 516; Boehm v. Beutler, 16 Tex. Civ. App. 380, 41 S. W. 658.

²⁴Therriault v. Compere (Tex. Civ. App.) 47 S. W. 750.

property be real or personal,²⁵ and need be in writing only when required by the statute of frauds.

Where the property stands in the wife's name, and even limited to her separate use, if the same be really his separate property or the community property, his deed alone will pass the title without her joinder.²⁶

§ 208. Conflict of Laws.

While the marital rights of parties married elsewhere are governed by the laws of this state in respect to the property acquired here, it does not at all follow that such property as they may have acquired in other jurisdictions, on being brought into this state, will be treated as though it had been acquired here. On the contrary, the rights of the individuals and the community are fixed by the laws of the jurisdiction in which such property is situated at the time the acquisition is made, and the removal with the property into this state cannot alter its status, nor affect its owner. Thus, money acquired by the joint efforts of the husband and wife in a state governed by the common law becomes the separate property of the husband, and on their removing with it to this state it does not become community.²⁷ Nor would property belonging to the wife at the time of her marriage in a common-law state again become hers upon removal of herself and husband with such property to this state. Our laws can only deal with property according to its status at the time dominion is acquired over it.²⁸ That the owners are nonresidents cannot affect the question. Its status will be determined by the same rules applicable to acquisition by parties resident of this state, and will be separate or community according as it is acquired by gift, devise, or descent, or otherwise.²⁹

²⁵Jacks v. Dillon, 6 Tex. Civ. App. 192, 25 S. W. 645.

²⁶Phoenix Ins. Co. v. Neal (Tex. Civ. App.) 56 S. W. 91.

²⁷Oliver v. Robertson, 41 Tex. 422; Blethen v. Bonner (Tex. Civ. App.) 52 S. W. 571.

²⁸McDaniel v. Harley (Tex. Civ. App.) 42 S. W. 323.

²⁹Heidenheimer v. Loring, 6 Tex. Civ. App. 560, 26 S. W. 99. See further of this, *ante*, § 34.

CHAPTER XIV.

SEPARATE PROPERTY.

- § 209. Statutory Definition.
- § 210. Her Right to Hold Generally.
- § 211. Registration of Her Separate Property; Statutes.
- § 212. Effect of Failure to Register Schedule.
- § 213. Registry of Her Muniments of Title.
- § 214. What is Separate Property; Generally.
- § 215. Property Owned or Claimed before Marriage.
- § 216. Property Acquired after Marriage by Gift.
- § 217. — by Gift from Her Husband.
- § 218. — by Husband, of Future Acquisitions.
- § 219. — Her Personal Earnings.
- § 220. Property Acquired after Marriage by Devise or Descent.
- § 221. "Increase of Her Lands."
- § 222. Slaves under Former Laws.
- § 223. Purchases with Proceeds of Separate Property.
- § 224. Property Taken in Discharge of Debt Due the Wife.
- § 225. Rents and Profits from Trust Estate.
- § 226. Proceeds of Her Land Adjudged by Court for Her Support.
- § 227. Life Insurance Policy in Wife's Favor.
- § 228. Property Purchased by the Wife on Credit.
- § 229. Damages to the Wife's Separate Property.
- § 230. Value of the Use of the Wife's Property when Unlawfully Detained by Another.
- § 231. Mutations.
- § 232. Presumptions of Community; Burden of Overcoming.
- § 233. Innocent Purchasers of Her Property.
- § 234. Liability and Charges.
- § 235. Conflict of Laws.

§ 209. Statutory Definition.

"All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife."¹ The article

¹Act March 13, 1848; Paschal's Dig. art. 4641; Const. art. 16, § 15; Rev. Stat. 1895, art. 2967.

as originally enacted also reserved to the wife the increase of her slaves, as well as of her lands, and was a radical enlargement of her property rights as they were under the previous act of 1840. The latter act reserved to her of the property owned or claimed by her before marriage only the lands and slaves, and her paraphernalia as defined at common law. All other property owned by her before marriage became community property of herself and husband.²

§ 210. Her Right to Hold Generally.

At common law the wife's separate estate was unknown. But the rules of that law have little or no application to our system of marital property rights. Our Constitution guarantees, and the statutes declare, that all property owned or claimed by the wife before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property. And her capacity to hold her separate estate is as perfect and complete as is that of her husband to hold in his separate right. Their right to so hold are defined in language almost identical. Marriage while it deprives the wife of many of her civil capacities and rights, does not deprive her of the right to own property,³ and this she may do in her own name without the intervention of trustee,⁴ as was required at common law. For reasons of public policy and social economy, the wife during coverture is restricted in the exercise of the rights usually incidental to the ownership of property, such as to manage, to dispose, and the like, but these are but just limitations in favor of the husband whose rights in other respects are similarly curtailed in favor of the wife. They are mutual cession of rights for the common good of the family, and in no way affect the rights of either to own separately. Her estate is separate in the sense that it belongs to her rather than to her husband, the community, or any other person as to that, and can only be charged or disposed of by her, subject to the limitations heretofore discussed.⁵ It is

²Act 1840; Paschal's Dig. art. 4641, § 3.

³Edrington v. Mavfield, 5 Tex. 363.

⁴Reynolds v. Lansford, 16 Tex. 287.

⁵Ante, chap. VI.

charged with the support of the family to the extent of its use, fruits, hire, revenue, and increase, the same as is that of the husband. It is the policy of the law, however, to favor the community, and to look disparagingly upon all efforts of either spouse at augmentation of the separate estates. Whatever belongs to the wife remains hers until by her own act she conveys it, or by death it descends to her heirs. Her husband can manage,⁶ but cannot charge or convey it.⁷ •

§ 211. Registration of Her Separate Property; Statutes.

“All property, real and personal, which may be owned or claimed at the time of marriage by any woman, or which she may acquire after marriage by gift, devise, or descent, shall be registered” as required by law.⁸ And the manner of registration provided for is that “each woman now married, or who may be hereafter married, may present to any officer authorized by law to take acknowledgments, or proof of instruments for record, a schedule particularly describing all the property, real and personal, which she now owns and possesses, or which she may own and possess at the time of her marriage, and make her statement under oath before such officer that the property described in the schedule is her separate property; and upon such statement being made such officer shall annex to the schedule a certificate of the fact under his hand and seal of office; which certificate shall be sufficient evidence for the recorder of any county to record the same.”⁹ And “each married woman, upon coming into possession of any property, real or personal, to which she had claim at the time of her marriage, or which she may afterward acquire, by gift, devise, or descent, shall have the same recorded in the same manner as prescribed in the foregoing article.”¹⁰

“The registration of the wife’s separate property herein provided for, if real estate, shall be made in the county or counties in which the same or a part thereof is situated; if personal property, in the county or counties where the same remains; and in case such personal property be removed out of the county, the

⁶*Ante*, § 36.

⁷*Ante*, § 37.

⁸Rev. Stat. art. 4654.

⁹*Ibid.* art. 4655.

¹⁰*Ibid.* art. 4656.

registration must also be made in the county to which the property is removed, within four months after such removal.¹¹

“All registrations of the wife’s separate property which have been made heretofore shall be deemed good and valid under this chapter; provided, said registrations were made in accordance with the laws then in force.”¹²

“The registration of any schedule of the wife’s separate property, made in accordance with the provisions of this chapter, shall be conclusive as against all subsequent creditors of and purchasers from, her husband.”¹³

§ 212. Effect of Failure to Register Schedule.

The statute has in view a well-defined object. It is to afford the wife a means of putting the world upon notice of her claim to the property thus scheduled, and to effectually conclude creditors and purchasers dealing with her husband from asserting the presumptively community character of her property, and thus putting her upon the proof of her title. If she were called upon to prove and reprove her title every time the same might be called in question by her husband’s creditors or purchasers she might be subjected to endless vexations. This registration is conclusive against subsequent creditors and purchasers from her husband. If they deal with him after such registration they cannot question the status of the wife’s property thus scheduled. Whatever the real facts may be, the statute imparts to this act of registration the evidentiary force here stated. No other purpose of the act is apparent to the writer. It is not made a requisite to the completeness of the wife’s title to her property that it be thus scheduled and registered. In the case of marriage settlements it is required that, in order to be valid as against subsequent creditors and purchasers from the husband, the contract must be acknowledged and recorded. But no such penalty is attached to the failure of the wife to schedule and register her

¹¹Ibid. art. 4657.

¹²Rev. Stat. art. 4659.

¹³Ibid. art. 4658; act April 29, 1846.

property. If such had been the intention of the legislature it could easily have so stated.¹⁴

§ 213. Registry of Her Muniments of Title.

Likewise it is not required of the wife to place of record her muniments of title. And her failure to do so cannot prejudice her right to assert her ownership. She is not called upon to thus proclaim to the world that property in her possession—for the statutory holding of the husband is for her—belongs to her.¹⁵ The record of her deed can serve only a similar purpose to the record of her husband's deed. The effects of its registration, or of its want of registration, are identical in each case. No failure to register her evidences of title, or even to assert the same, can work a forfeiture of her property, unless it be under such circumstances as amount to fraud¹⁶ or operate as an estoppel. No higher diligence along this line is required of a married woman than of a married man.

§ 214. What is Separate Property; Generally.

Without distinction as to whether it be real or personal, the wife's separate estate consists of (a) all property owned or claimed by her before marriage; (b) that acquired afterward by gift; (c) by devise or descent; and (d) the increase of all lands thus acquired. These will be separately considered in their order. Property is separate or community according as it reasonably falls within one of the classes named, or not. While the courts have at all times given to the statute a rather strict construction, and favored the community rather than the separate estate, many items and funds and species are properly of the separate estate, which do not come within the literal meaning of the statute. Such, for example, as property taken in payment of a pre-existing debt, or in exchange for separate property, *et*

¹⁴Edrington v. Mayfield, 5 Tex. 363; LeGierse v. Moore, 59 Tex. 470; Schneider v. Fowler, 1 Tex. App. Civ. Cas. (White & W.) § 857; Gamble v. Dabney, 20 Tex. 69.

¹⁵Parks v. Williard, 1 Tex. 350;

Warren v. Dickerson, 3 Tex. 460; Bank of United States v. Lee, 13 Pet. 107, 10 L. ed. 81; Kendrick v. Taylor, 27 Tex. 695.

¹⁶Reynolds v. Lansford, 16 Tex.

287.

cetera. This is in no sense an enlargement of the scope of the act, but the only reasonable construction of it. So it ought to be borne in mind that ours is a liberalizing statute, and our interpretation of it should not be too largely influenced by the rules of former systems, but rather by the spirit which prompted our earliest lawmakers to emancipate, in part at least, one half of our citizens from an unrighteous thralldom.

§ 215. Property Owned or Claimed before Marriage.

It matters not from what source the title may have arisen, nor the character of the property, whether real or personal, nor whether chose in action or in possession; whatever is owned or claimed by the wife before marriage remains hers afterwards. Such has been true since the act of 1848. Under the act of 1840 her personal property, save slaves, went to the community by force of statute.¹⁷ We have never countenanced the common-law doctrine that marriage conferred her property upon her husband. The use of the expression "claimed" doubtless was meant to indicate that where the right to property had accrued before marriage it would be hers, notwithstanding the legal title or evidences of title might not be obtained until after marriage; that its status would be determined by the source of the title, rather than by the time of its actual acquisition.¹⁸ The property may be owned or claimed at marriage by virtue of purchase, gift, devise, or descent.¹⁹ It may have been the community property of herself and a former husband, yet, being owned by the wife before her second marriage, it cannot become a part of the community of that marriage. It would be hers by descent as though inherited from another than her husband.

It may happen that rents, hire, and the like, which, as we have already seen, are ordinarily community property, may, by force of a contract of renting or hiring entered into before marriage, be her separate property. An enforceable obligation or rental contract is a chose in action, and as such may be "owned or

¹⁷See *ante*, § 169.

¹⁸Nelson v. Frey, 4 Tex. App. Civ.

¹⁹Welder v. Lambert, 91 Tex. 510, Cas. (Willson) § 248, 16 S. W. 250. 44 S. W. 281.

claimed by the wife before marriage," even though the same be not reduced to possession until after marriage.

§ 216. Property Acquired after Marriage by Gift.

The second class of property reserved by law to the wife is such as she may acquire after marriage by gift. The first inquiry arising is whether or not there are any limitations to her right with respect to the origin of the donation. With a donor duly authorized to give, whose title thus conveyed would not otherwise be invalid, there are none. It is only necessary that the donation be good when tested by the ordinary rules applicable to such transactions. In *Zorn v. Tarver*, 57 Tex. 388, Miss Young purchased at execution sale a tract of land, and immediately executed to Mrs. Tarver, her cousin, a bond for title to said property in consideration of the amount of her bid at such sale, and accepted the latter's notes therefor due at a subsequent date; intending to sell to Mrs. Tarver to the extent of the notes, and to make her a gift of the difference between such amount and the real value of the land, which was worth considerably more. Later the notes were fully paid off from moneys arising from a sale of a portion of the land. Upon a contest between Mrs. Tarver and her husband's creditors, the property was held to be her separate estate as a gift from her cousin.

The conveyance may be in form to the community; it may be such in fact. But if in form to the community, as, for example, to the husband only, intending it for the use of the wife, or to the wife directly without accompanying words limiting the same to her separate use and benefit, the real intention of the donor may be shown by parol, and the separate character of the property proved.²⁰ The fact, too, that the gift may be to the wife in compensation for some service rendered cannot create rights in the community, so long as it is intended as a donation merely, and is not an acquisition by onerous title. So a promise by one to a married woman to convey to her separately a lot of land to

²⁰*Dunham v. Chatham*, 21 Tex.

231. See *Resulting Trusts*, post, § 239.

induce her to consent to a removal of her residence, followed by an actual occupancy of such land by the woman and her husband, makes the land the separate property of the wife,²¹ a parol gift of the sort mentioned, followed by occupancy and improvements, raising valuable equities in the wife's favor, if not a right to enforce a conveyance.²² If the gift be in fact to the husband and wife jointly, they would then own, each, in an undivided capacity, a separate estate therein, to the extent of the portion donated.²³ It is largely a question of the intention of the donor. If the intention be to give to the community, the new acquisition could probably partake of the nature of that estate. But if, on the other hand, the intention be to give to the wife the entire estate, or even a part thereof, along with her husband or anyone else, no reason is apparent why she should not be permitted to enjoy in the fullest sense the benefits of such donation. There would be no excuse for saying that, because the husband enjoyed an estate in a particular piece of property, any estate which the wife likewise enjoyed by gift in the same property would, in consequence, be community.

§ 217. — by Gift from Her Husband.

By far the most numerous are the cases in which the title by gift is acquired from the husband. The right to make such gifts has been discussed.²⁴ The gift may be of the community or of his separate property.²⁵ When his intention to make her a gift has been shown, the estate becomes forthwith her separate property, and subject to the same rules as property acquired by any other method known to the law.²⁶ This intention may be shown by his declarations,²⁷ his conduct, and acts,²⁸ or by the recitals in his conveyance.²⁹ The husband's causing title at his own

²¹Samuelson v. Bridges, 6 Tex. Civ. App. 425, 25 S. W. 636.

²²La Master v. Dickson, 91 Tex. 593, 45 S. W. 1.

²³See Stockstill v. Bart, 47 Fed. Rep. 231; Bradley v. Love, 60 Tex. 472; Rogan v. Williams, 63 Tex.

²⁴*Ante*, chap. V.

²⁵Avery v. Avery, 12 Tex. 54; Story v. Marshall, 24 Tex. 305;

Lewis v. Simon, 72 Tex. 470, 10 S. W. 554; Hunter v. Hunter (Tex. Civ. App.) 45 S. W. 820; *ante*, § 80.

²⁶Peters v. Clements, 46 Tex. 114; Clardy v. Wilson (Tex. Civ. App.) 58 S. W. 52.

²⁷*Ante*, § 85.

²⁸German Ins. Co. v. Hunter (Tex. Civ. App.) 32 S. W. 344.

²⁹Compare *ante*, § 82.

enclosure sale to be taken in his wife's name, and his subsequent recognition of her separate claim, make the property her separate estate, since such conduct will evidence an intention on his part that she shall so hold it.³⁰ Of course the wife's claim in such cases is liable to be defeated for any species of fraud. It would probably be a superfluity to so state, were it not that such transactions are so frequently entered into from improper motives. Aside, however, from the just rights of third parties, the husband's gift of his own or of the community property transfers it to the separate estate of the wife, and places it beyond his power of further disposition.

As to there are gifts of the community, and even of the husband's separate property, to the wife, where creditors have no ground of complaint. Reference is made to the case of exempt property. If the creditor can, by no process of law, subject the property to his demand, it is agreed by all lawyers that he has no concern with its disposition. Its sale or gift cannot be fraudulent. Hence the husband may give outright to the wife their homestead or other exempt property, and, too, whether the title is in him or in the community. And the proceeds of such gift, when sold, belong to her. He may likewise convey to her property in consideration of her signing a conveyance to their homestead; or donate to her a part of the proceeds thereof, when

³¹ The courts seem to bottom such transactions upon the necessity of the consideration of such transfer,—the release by the wife of her rights of homestead in the property; but it occurs to the writer that property obtained in exchange for the release of such rights, however valuable they may be, would not in any case be her separate property in the absence of a gift of the property to her by the husband. If it were not dependent upon gift, upon every sale of the homestead, the wife's rights being always the same, she would acquire a separate estate in the proceeds, whether she had previously owned any interest in the fee, or not, for she would have surrendered her homestead rights.

Waters v. Clements, 46 Tex. 114.
Aden v. Giddings, 15 Tex. 485;
W. v. Light, 81 Tex. 414, 16 S. W.
Gatewood v. Scurlock, 2 Tex.
 App. 98. 21 S. W. 55; *Waco*
 [S. W.] 15.

State Bank v. Stephenson Mfg. Co. 4
 Tex. Civ. App. 137, 23 S. W. 234;
Burnham v. McMichael, 6 Tex. Civ.
 App. 496, 26 S. W. 887.

This would be an acquisition by her during marriage, not by gift, devise, or descent, nor in exchange for other separate property belonging to her. That her homestead rights are valuable, and might support a promise in a contract, there can be no doubt; but that the proceeds of a sale of her interest would necessarily be her separate property does not at all follow. It would only be such where it was the intention of her husband that she should have it. In other words, that it should be a gift by him to her. It cannot be argued that her homestead rights are separate to her, and that the proceeds arising from a sale would, in consequence, be separate. As we have just said, such an acquisition does not come within the statute defining her separate property. Her rights in the homestead are not property rights; they cannot be transferred, nor will they descend. If they are property the time and manner of the acquisition class them with the community rights. If a part of the proceeds of the sale of the homestead becomes the wife's because she releases her homestead right, then, whether her husband willed it or not, by a system of transfers and sales she would in time come to own the entire fee, whereas she originally owned no part. This is not the reason for saying that proceeds of a sale of the homestead may become the separate property of the wife. The real reason is that the husband, by exercising a right of which no one can complain, makes her a gift of the homestead, or the proceeds in whole or in part.

§ 218. — by Husband, of Future Acquisitions.

Barring existing creditors, there is no reason why the husband should not contract with his wife to pay her interest upon a loan of her money.³² The law entitles him to the use of it, but he is not thereby forbidden to pay her for this use should he see proper to do so. If the use of the fund be not a sufficient consideration, since in law he is entitled thereto, it would be good as a gift, and the interest thus promised and paid her would become

³²Hall v. Hall, 52 Tex. 294.

her separate property.³³ He may also convey to her property upon which there are encumbrances, as for the purchase money, which charges are contemplated to be paid out of the community funds, or from his own as to that, and such conveyances will be upheld as valid gifts if such was the intention.³⁴ In short, he may as well make her a gift of his future earnings and acquisitions as of those already in his possession. In either case the only principle to be observed is that the superior rights of creditors must not be injuriously affected. Such gifts are not in violation of the statute requiring that "actual possession shall have come to and remained with the donee or someone claiming under him."³⁵ The writer believes, however, that this rule permitting gifts of future acquisitions should be restricted to the parties themselves or those claiming under them, and that such arrangements could not affect even subsequent creditors and purchasers from the husband without notice, where the rights of such creditors and purchasers attach prior to the actual reduction of such property so given to the possession of the wife, or, what is in law her possession, the possession of her husband. In *Cavil v. Walker*, 7 Tex. Civ. App. 305, 26 S. W. 854, the wife paid two thirds of the purchase money for property, and she and her husband executed a note and mortgage back for the remaining one third. This was subsequently paid out of moneys arising from her earnings. The husband was insolvent. The deed to the property purchased, by apt words placed the legal title to the property in the wife. The husband intended the entire property should belong to the wife. At the time of making the purchase and executing the note he was solvent. Upon a judgment against the husband a subsequent creditor sought to subject the one-third interest in the property to a sale under execution. Justice Stephens, in denying the right, said: "Being free from debt when the purchase was made, and the promissory note executed by which this unpaid purchase money became a

³³*Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 975; *Engleman v. Neal*, 14 Tex. Civ. App. 1, 37 S. W. 12; *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 380, 23 S. W. 520.

³⁴*Swearingen v. Reed*, 2 Tex. Civ. App. 364, 21 S. W. 383.

³⁵*Bruce v. Koch* (Tex. Civ. App.) 40 S. W. 626.

personal liability against him, no subsequent creditor of his can challenge the validity of the debt, and he may therefore lawfully discharge it with community funds. To do so is but to exercise the right, so long recognized in this state, of preferring his creditors. The act of paying off this debt was not in any sense fraudulent, but the exercise of a strictly legal right. A subsequent creditor cannot, therefore, invoke the principle that the debtor must be just before he is generous. . . . Where the act complained of, as in this case, is lawful and valid, the principle has no application, though it may defeat the collection of a just debt, and incidentally remove a lien from the wife's property." It will be seen that the effect of this holding was to permit the husband to make a gift of the amount of his note to the wife, which note it seems was not discharged until after the accrual of the indebtedness asserted against him. This is no doubt a sound conclusion for the reasons assigned that the husband, at a time when he was competent by reason of his solvency, contracted an enforceable obligation which he had a right, and it was his duty, to discharge. But it is not every gift of such future acquisitions that stands upon this footing. The husband's note to his wife, promising interest, is not as to such interest supported by such considerations. Nor is his promise to donate to her the future earnings or rents from her property. As such earnings, interest, and rents are reduced to possession, if, then, the husband be solvent he may give them to her. But if, after his promise, and before they are so reduced to possession, creditors' rights have intervened, it is difficult to see upon what principle these things should be hers. For it would be permitting husband and wife by their agreement to change the character of their future acquisitions from community to separate property. There may arise instances where such rents, profits, and earnings, though not actually reduced to possession, are nevertheless represented by promissory notes or other evidences of right, which of themselves, as property rights, are then transferable, in which case the husband could probably make a valid gift of them. But what we mean to say is, that mere promises, upon the part of the husband, to donate to the wife the future acquisitions of his own or the community estate should not be permitted, where to do so would be to withdraw such acquisitions from the demands of creditors

whose rights have attached subsequent to the promise to donate, but prior to the actual reduction of such acquisitions to tangible form.

§ 219. — Her Personal Earnings.

In the above connection we may also mention specially a class of cases where the courts hold, seemingly as an inference of law, that the husband has made a donation of future community acquisitions to the wife. We refer to those instances where he has, by abandonment, impliedly released to her her personal earnings. By such abandonment, and his concurrent failure to assert any claim to her earnings, a gift has sometimes been implied,—or rather said to be proved.³⁶ If the intention be shown, then no doubt he may thus make her a gift of her future personal earnings, as he may of any other future acquisitions,³⁷ and certainly his intention to do so may well be evidenced by his wilful desertion of her and failure to claim such earnings. Such acts upon his part might evidence such relinquishment, yet similar conduct upon the part of the wife might not produce a like inference.³⁸ It is said by Stewart,³⁹ that the ability to earn is not property, and therefore the husband may waive his right to have his wife labor for his use, even as against creditors. But her earnings are property, and most assuredly his right to dispose of them will be controlled in a measure by the rights of his creditors. This is the same thing considered in the foregoing section.

The subject of the wife's pin money has received very little consideration in this country, and if there is ever an allowance to her for such purpose,—whether from her personal earnings or other acquisitions,—it is so by virtue of a definite, affirmative gift from the husband; and even this must not be to the prejudice of creditors.

§ 220. Property Acquired after Marriage by Devise or Descent.

The next class of property protected to the wife is that accru-

³⁶Queen Ins. Co. v. May (Tex. Civ. App.) 35 S. W. 829.

³⁷Post, § 177.

³⁸Hus. & W. 65.

³⁹Johnson v. Burford, 39 Tex. 242;
Cavil v. Walker, 7 Tex. Civ. App.
305, 26 S. W. 854.

ing to her after marriage by devise or descent. Whatever limitation may be subjoined to any devise will, of course, attach the same as though the bequest was to one not similarly incapacitated. If the fee be devised to her, its use, rents, fruits, profits, and issues, except the increase of land, belong to the community. If the devise be to a trustee with directions to pay to her the fruits, profits, rents, and the like, the devise will be of such fruits, rents, profits, etc., and they, and not the fee, will be reserved to her.⁴⁰ Property taken in consideration of a release by her of her rights to an inheritance will be, of course, her separate property too.⁴¹

§ 221. "Increase of Her Lands."

The expression "increase of all lands," to be found in our statutory definition of the separate estates, has occasioned very much discussion by our courts, with little or no affirmative results. It has been a part of the marital law of the state since a very early day of our juridical existence, yet, strange to say, has never been satisfactorily defined by bench or bar. Many arguments and decisions of a negative kind have been indulged; for instances: It was early decided, under our act of 1848, that cotton grown upon the wife's land by the labor of her slaves became the common property of husband and wife, and was not included in the term "increase of land;"⁴² that lumber sawed at the mill, which was the separate property of the wife, by the labor of slaves also her separate property, and out of timber procured from lands likewise her separate property, nevertheless became community, and was not reserved to her under the statute in question;⁴³ and also that bricks made upon her separate land and out of the soil of such land, the husband having nothing to do with their manufacture, and paying no part of the expense of making them, were community rather than separate property.⁴⁴ But in none of these cases, nor later ones following them, does the court attempt to define "increase of land," until in *Evans v.*

⁴⁰See *post*, § 225.

⁴¹*O'Connor v. Vineyard*, 9 Tex. 488, 44 S. W. 485.

⁴²*De Blane v. Lynch*, 23 Tex. 25;

Forbes v. Dunham, 24 Tex. 611.

⁴³*White v. Lynch*, 26 Tex. 195.

⁴⁴*Craxton v. Ryan*, 3 Tex. App.

Civ. Cas. (Willson) § 367.

rinton, 12 Tex. Civ. App. 158, 34 S. W. 350, and *Cabell v. nczer* (Tex. Civ. App.) 35 S. W. 206. The apparent difficulty and one that has led to an erroneous conclusion in the two cases named, is in a hesitancy upon the part of the courts in including crops and the like upon the wife's land within the meaning of the term "increase of land," because of the fact that the acquisition is more the result of the labor and care of one or both spouses, than the spontaneous increase of the land. There ought to be no difficulty in assenting to the general proposition that crops grown upon land are its increase, for everyone knows they are such. In *DeBlane v. Lynch*, 23 Tex. 25, the court expressly admits it in the following very apt words: "In an etymological sense, it cannot be doubted that the word 'increase,' as applied to land, or to the soil, means that which grows out of it, or that which is produced by the cultivation of it. The word is frequently employed in this sense in the English Bible. Instances of it will be found in the twenty-fifth chapter of the book of Leviticus. It is there said: 'And for thy cattle, and for the beast that are in thy land, shall all the increase thereof be meat.' Again it is said: 'Behold, we shall not sow nor reap in our increase.' So, in the sixty-seventh Psalm, the expression occurs: 'Then shall the earth yield her increase'. That the word was properly used as applying to the produce of the soil cannot be doubted, when it is remembered that the translators of the King James' Bible have perhaps never been surpassed in accurate scholarship." The court then lays down the general principle, which lies at the foundation of the whole system of community property, that "whatever is acquired by the joint efforts of the husband and wife shall be their common property," to which everyone most readily assents, and concludes that crops as grown upon the wife's land, by the labor of her slaves, is properly a part of that fund. A proper conclusion: Not that crops do not come within the meaning of the word "increase," but because they are impressed with the community character by the labor properly belonging to the community. The same may be said of the cases involving the status of lumber, brick, and the like, sawed and manufactured from the products of the wife's separate land. The husband is entitled to the control of her land, and the community to its use, except that she must re-

ceive its increase. This does not imply that she is therefore to receive the benefits of her husband's labor as well, or of her own, for the very reverse of this is the law. But, if there be potency in the positive enactment of law, the increase of all lands belonging to her belongs to her in her separate right. I take it that this increase signifies the *fructus naturales*, or such increase as is unaffected by extrinsic facts impressing it with the community character under other equally well-defined statutes and rules. Now, the increase of land naturally embraces such things as the annual crops grown thereon; the fruits of its orchards and vineyards; its grasses, timber, marketable sand, gravel, stone, minerals, and the like. These belong to the wife, except in those cases where they are impressed with the community character by reason of the bestowal of the community labor or funds upon them. But the spontaneous growth and output of her land—her uncut meadows of hay; her standing trees;⁴⁵ undug sand and gravel; unquarried stone and unmined minerals—cannot in any sense belong to the community. And the segregating of these things from the soil, and preparing them for market, cannot affect their status as separate property, and convert them into community, unless it be done with community funds or labor. It then becomes *fructus industriales*, and would be such a commingling of separate and community property as that the wife could not distinguish and separate them, and the whole would properly be community. For whoever commingleth his goods with another may lose them. And especially does this principle apply here with more than ordinary force, since it is at all times incumbent upon the wife to clearly trace her property through all its mutations. The failure to recognize the proper reasons for the holding in the early cases noticed, and the eagerness to attribute to the expression "increase of land" a meaning, have caused our intermediate courts, in the cases of *Erans v. Purinton*, 12 Tex. Civ. App. 158 34 S. W. 350, and *Cabell v. Menczer* (Tex. Civ. App.) 35 S. W. 206, to fall into the error of holding that the enhancement in value of land by reason of the fluctuations of the real-estate

⁴⁵*Missouri, K. & T. R. Co. v. Starr*,
22 Tex. Civ. App. 353, 55 S. W. 393.

market was "increase of land" within the meaning of the statute. It has been decided by our supreme court, and on principle cannot be denied, that the enhanced value of personal property (animals) by reason of natural growth and care and food bestowed by the community did not thereby become community property to the extent of such enhancement under the rule that the increase of the wife's separate property becomes community.⁴⁶ If the enhancement in value of personal property is not its increase, neither is the enhancement in value of real property its increase. Increase, when applied to animals, means their progeny and descendants; and in some instances the other products of their body,—as the wool from the flocks, dairy products from the herd, and the like. When applied to slaves it has reference to their offspring.⁴⁷ The construction here given to the word comports with the etymology of the term, and accords with the universal understanding.

222. Slaves under Former Laws.

During the period of our history when slavery was allowed, not only could the wife own them in her separate right, but their increase was specially reserved to her as well.⁴⁸ It was held, even prior to the statute, that the increase of female slaves properly belonged to the owner of the mother.⁴⁹ By the act of 1840 slaves and lands owned before marriage were the only species of property reserved to the wife separately.

223. Purchases with Proceeds of Separate Property.

Since the wife's separate property may be alienated in the manner prescribed by law, the inquiry immediately arises, whether or not the proceeds of the same, when sold, assume the same status as the property disposed. But one answer can be given. Where the statute nowhere declares that her rights are forfeited by an alienation (if, indeed, such restriction could be lawful) the right to own would carry with it the incidental right of disposition. The proceeds arising from such disposition can-

⁴⁶Stringfellow v. Sorrells, 82 Tex. 77, 18 S. W. 689.

⁴⁷Paschal's Dig. art. 4641.

⁴⁸Cartwright v. Cartwright, 18 Tex. 626.

⁴⁹Cartwright v. Cartwright, 18

not, by any process of reasoning, be said to be converted from the separate into the community fund. It will stand in lieu of the thing given for it, and occupy precisely the same status as property -as that did. If her separate estate consists of land or money, she may sell the one and invest the other; and in either case the new acquisition would belong to her.⁵⁰ Even if her money enter in part into the acquisition of a thing, she is the equitable owner thereof in the proportion her money bears to the whole.⁵¹ There could be no useful purpose subserved in requiring her to keep her separate property intact in kind. Perfect liberty of selling, exchanging, investing, and reinvesting is accorded her so long as she can point with certainty to her property, uncontaminated with any other estate.⁵²

Of course she may make the investments of her money, herself, her husband consenting, or he may make them for her with her funds, or with his own where he has used hers and desires to replace them,⁵³ or through the instrumentality of any other agent. And if the moneys arise from the sale of lands limited to her for life, she is entitled to such moneys as well as property purchased therewith, under the same limitations of her former estate.⁵⁴

In acquiring property by purchase her rights are determined in the same manner as those of others not similarly incapacitated. Thus, where she pays for property out of her separate means without notice of a prior unrecorded deed, she will hold as a bona fide purchaser, notwithstanding the grantor be her husband.⁵⁵

§ 224. Property Taken in Discharge of Debt Due the Wife.

Since there can be no distinction as to the character of the

⁵⁰Schneider v. Fowler, 1 Tex. App. Civ. Cas. (White & W.) § 856.

⁵¹Clardy v. Wilson (Tex. Civ. App.) 58 S. W. 52; Goddard v. Reagan, 8 Tex. Civ. App. 272, 28 S. W. 352; Parker v. Fogarty, 4 Tex. Civ. App. 615, 23 S. W. 700; Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705, S. C. 84 Tex. 303, 19 S. W. 477; Hunt v. Matthews (Tex. Civ. App.) 60 S. W. 764.

⁵²Love v. Robertson, 7 Tex. 6; Huston v. Curl, 8 Tex. 239; Rose v. Houston, 11 Tex. 324. See *Mutations*, post, § 231.

⁵³Aultman v. George, 12 Tex. Civ. App. 457, 34 S. W. 652.

⁵⁴Millikin v. Smoot, 71 Tex. 759, 12 S. W. 59.

⁵⁵Pearce v. Jackson, 61 Tex. 642.

separate property, that is, whether the same be real or personal, corporeal or incorporeal, choses in action or in possession, it follows that that portion of the estate which consists of debts owing may be reduced to possession by a collection of such debts; and the same, when collected, will still occupy the same relation to the estates of the partners. This is a corollary to the universally conceded right to sell or exchange one species of separate property for another. Such is not an acquisition of property by the wife in such manner as to make it community. Its acquisition dates back to the original source of the debt thus paid, and its status as separate or community property thus determined. The debt may be owing by the husband as well as by any other. His conveyance to her of his separate property, or of the community, in satisfaction of a debt, will constitute the property a part of her separate estate.⁵⁶

She may, of course, receive in exchange for her property the negotiable promissory notes of another, and they are property and belong to her, as did the property for the purchase of which they were given.⁵⁷ The interest upon these notes may,⁵⁸ or may not,⁵⁹ become separate property. It is immaterial, except as the rights of innocent persons may be affected, whether her notes be in form to her or to the community.

§ 225. Rents and Profits from Trust Estate.

It must be conceded that if an estate were conveyed by any other than the husband, to a trustee, in trust that the issues, rents, increase, profits, and the like be by such trustee delivered to the wife, in her separate right, the gift, bequest, or devise, as the case might be, would be specifically of such issues, rents, increase, or profits, and would hence be within the letter and spirit of the statute making such the separate property of the wife. For surely one entitled to convey the greater, may convey the lesser, estate. In such a case it is not the fee, nor the *corpus* of the property granted, but only its use, rents, prof-

⁵⁶Mitchell v. Mitchell, 84 Tex. 303, 19 S. W. 477; Hamilton-Brown Shoe Co. v. Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520; McKamey v. Thorp, 61 Tex. 648.

⁵⁷Rose v. Houston, 11 Tex. 324; Hamilton v. Brooks, 51 Tex. 142.

⁵⁸Ante, § 218.

⁵⁹Ante, § 191.

its, and increase.⁶⁰ If this be true, then there can be no question, not involved in the other proposition, but that the husband may also convey to a trustee for the beneficial use of the wife. For the right of the husband to convey to the wife is in no way abridged. True, the wife's statutory separate estate is well defined, and does not in express terms include such things as are under discussion; but no express provision is necessary; the general allowance to her of the right to acquire property by gift is sufficient. But, aside from the statutory separate estate, the right of the wife to the old common-law equitable separate estate seems nowhere to be denied. As was said by Justice Waller in *Hutchison v. Mitchell*, 39 Tex. 487: "We can find nothing in any of the Constitutions or laws of the state or republic which would prevent a married man from declaring an express trust in favor of his wife, and giving her the exclusive use and enjoyment of all the rents, issues, and profits of the trust estate, provided there is no fraud in the transaction against creditors." No different test will be applied to the conveyance of the husband, of the character mentioned, than to those of any other individual, except possibly a closer scrutiny for fraud may be permissible.

Nor is there any inhibition against the wife conveying her property to any lawful use she may see fit. So long as the title remains in her the husband is required to manage and control the estate: charged with its custody and care, he is credited with its rents and profits. But if she desire, and he assent, she may convey it, and his creditors have lost nothing in which they had any rights. So, she may thus convey in trust, for the support of herself, or children, and direct that the rents and profits be so applied.⁶¹ It is a withdrawal of these rents and profits from the community and transfer to her separate estate, it is true, but, after all, amounts to no more than a mere failure upon the part of the husband to acquire funds for the community, by the retention of the management of the wife's

⁶⁰*McClelland v. McClelland* (Tex. Civ. App.) 37 S. W. 350. See also *Gamble v. Dabney*, 20 Tex. 69.

⁶¹*Schepilin v. Small*, 4 Tex. Civ.

App. 493, 23 S. W. 432; *Scott v. American Nat. Bk. & Tr. Co. v. M. & N. Bk. Co.* 60 Tex. 544.

property—a thing beyond the power of the courts to compel. It cannot be conceived how a creditor could complain that his debtor declined the opportunity to earn the means with which to discharge his debt. The result to creditors would be no different if the wife were to convey her property absolutely to another, and this we know she may do. It is hers and they have no concern with its administration.⁶² If an unmarried woman make such a conveyance, with directions to the trustee to pay to her periodically the rents, revenues, and profits of the estate, the annuity thus created will, upon marriage, be held to be her separate property. It is “property owned or claimed before marriage.”⁶³

§ 226. Proceeds of Her Land Adjudged by Court for Her Support.

The statute provides that, should the husband fail or refuse to support his wife from the proceeds of the lands she may have, or fail to educate her children as her fortune would justify, she may complain to the county court, and upon making satisfactory proof have so much of such proceeds decreed to her as may be deemed necessary for such support and education.⁶⁴ Where the power of the court has been thus invoked, and an order made setting apart the proceeds of her lands, such things as are embraced within the order become the separate property of the wife, and are not liable to the creditors of the husband.⁶⁵ The statute seems to contemplate such things as the crops, rents, and other revenues of her land, rather than the proceeds arising from its sale and disposition; and would probably embrace such things as were necessary to a profitable cultivation, use, and enjoyment of such crops, rents, and proceeds, where purchased out of such funds.⁶⁶

§ 227. Life Insurance Policy in Wife's Favor.

It has been repeatedly shown that the wife may be the beneficiary of a gift from her husband. The purchasing of a life in-

⁶²*Monday v. Vance*, 11 Tex. Civ. App. 374, 32 S. W. 559.

⁶³*Krohn v. Krohn*, 5 Tex. Civ. App. 125, 23 S. W. 848.

⁶⁴Rev. Stat. art. 2972.

⁶⁵*Young v. Willis*, 63 Tex. 388.

⁶⁶*Young v. Willis*, 63 Tex. 388.

insurance policy by him, with proceeds payable to her, is most convincing evidence of his intention to make the proceeds her separate property.⁶⁷ It forms no part of the estate of the husband or of the community, but upon the death of the insured passes to the wife's separate use.⁶⁸ There might arise a question concerning the right of the husband to give to the wife the premium payments where these were out of the husband's separate estate or the community, but this could only arise in the event there were creditors or others whose rights would thereby be injuriously affected,⁶⁹ and then they would have no interest in the policy further than the amount of the premium payments, if, indeed, they would have this right, which is not altogether clear.

§ 228. Property Purchased by the Wife on Credit.

It is a common error, begotten possibly of a misunderstanding of the scope of that line of decisions in this state denying the wife's right to engage in a mercantile enterprise and to make purchases therefor upon credit, to say broadly that the wife cannot acquire property in her own right by a purchase upon credit,—admitted that she can own property; that she can, of course, purchase for cash; that she can contract a debt for the benefit of her separate estate; but denied that she can purchase upon credit. This popular error is very far from the true rule. No criticism of the line of decisions can justly be made. Merchandise purchased by a married woman upon credit, for the purpose of replenishing her stock, with the usual expectation of making payments therefor out of the profits of the enterprise, is properly held to be community property.⁷⁰ For her purchase is for and with the community property; and further, the husband's authority, often impliedly, but more frequently expressly, given to the transaction, makes the debt his, and not hers in any sense. In other words, the husband makes or permits the purchases for the wife in form, but for the community in fact, and the law will look at the substance rather than the form of such transactions.

⁶⁷Evans v. Opperman, 76 Tex. 293, 13 S. W. 312; Washington L. Ins. Co. v. Gooding (19 Tex. Civ. App. 490) 49 S. W. 123.

⁶⁸White v. White, 11 Tex. Civ. App. 113, 32 S. W. 48.

⁶⁹Compare *ante*, § 195.

⁷⁰*Ante*, § 142.

But the wife's right when fairly exercised, to purchase upon credit, and to become the owner of the thing thus purchased, cannot well be denied. By the expression "fairly exercised" is meant that she must contract for the property purchased with a bona fide intention to pay therefor from her own funds; and that, when purchased, the same shall belong to her in her separate right; that neither her husband's nor the community funds, nor the credit of either estate, are to enter into the acquisition. When these elements appear in a purchase, it is difficult to see how the community could justly lay claim to the acquisition. That estate is not bound, nor should it be profited, by the transmutations of her separate property, for the transaction is nothing else in effect. That the delivery of her separate estate intended as payment of the new acquisition is delayed for a time, rather than made *in præsenti*, argues nothing, and should not convert into community property what would otherwise be separate. This is no new doctrine, but the proper rule as gathered from the decisions of the courts, and dictated as well by the most obvious reasons.⁷¹ And the fact that the husband joins *pro forma* in the notes for the unpaid purchase money⁷² cannot defeat her rights, where it was intended by all parties that payment should be made out of her funds, and no credit is extended to the husband. The status of borrowed money as property is governed by this same principle, and is community or separate, as the husband's credit is employed or not.⁷³ Even where the title is taken by the husband in his own name without her knowledge, having made the cash payment, and in good faith expecting to pay the balance of the purchase money, the equitable title to the entire property will be in her.⁷⁴ In all such cases she has a separate right in the entire property which she has the power to perfect by a full payment of the purchase money. The right

⁷¹McBride v. Banguss, 65 Tex. 174; Ullmann v. Jasper, 70 Tex. 446, 7 S. W. 763; Schuster v. L. Bauman Jewelry Co. 79 Tex. 179, 15 S. W. 259; Blum v. Light, 81 Tex. 414, 16 S. W. 1000; Parker v. Fogarty, 4 Tex. Civ. App. 615, 23 S. W. 700.

⁷²Cavil v. Walker, 7 Tex. Civ. App. 305, 26 S. W. 854; Cobb v. Trammell,

9 Tex. Civ. App. 527, 30 S. W. 482.

⁷³Evans v. Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350; Hirshfeld v. Howard (Tex. Civ. App.) 59 S. W. 55; *ante*, § 184 and 143.

⁷⁴Carter v. Bolin, 30 S. W. 1084, S. C. later decision, 11 Tex. Civ. App. 283, 32 S. W. 123.

is hers by reason, not only of her having paid in part, but of her bona fide expectation of making the remaining payments out of her separate estate. If it is a right at all it cannot be defeated by creditors of the husband. This right, then, being in the entire property, and not limited to an equitable interest to the extent of her funds actually used, it must be admitted that to the extent of the unpaid purchase money she has purchased upon credit. The court of civil appeals of the fifth district, through Justice Rainey, has held that a married woman cannot purchase property wholly upon credit, upon the argument that "a wife's equity in such cases arises from the actual investment of her separate money, or the transfer of her separate property."⁷⁵ But if her equities arise from the actual investment of her separate property alone, and not in part from the expectation that unpaid payments are to be made from her separate estate also, then her rights would only extend to an interest in the property proportional to her funds actually used. This is the case where her funds along with the funds or credit of another estate enter into the acquisition of property, but not where no other funds or credit are employed. Should the community actually make the remaining payments in either case, where not intended as a gift, that estate would be equitably entitled to reimbursement, but the title to the property would be in the wife, and creditors would have no recourse against it.⁷⁶ Whether or not the wife has funds, or a reasonable expectation of having them, for the purpose of discharging such deferred payments, and the real intention of the parties, are proper subjects of inquiry as affecting the real character of the transaction, and hence determining the status of the property.⁷⁷

§ 229. Damages to the Wife's Separate Property.

The owner of property is permitted to recover damages for an injury thereto by another, upon the principle that the property is thus made less valuable by the amount of the damages awarded. Now, the wife has a right to retain her property unim-

⁷⁵Harrison v. Mansur-Tibbetts Improvement Co. 146 Tex. Civ. App. 630, 41 S. W. 842.

⁷⁶Compare *ante*, § 205.

⁷⁷Compare *ante*, §§ 142, 192.

d in value by the unlawful acts of any other person, and a cause of action accrues to her by reason of any damage to, the action is in behalf of her separate estate, and the recovery belongs to her in the same right.⁷⁸

Value of the Use of the Wife's Property when Unlawfully Detained by Another.

an action by a married woman to recover possession of her property, and for the value of its hire and use, the defendant admitted that such hire, rents, *et cetera*, were community property and sought to offset them with a claim against the husband, the court permitted the wife to recover the value of the hire of the property, as being her separate property.⁷⁹ It was recognized in the course of the opinion in that case, however, that the revenues, hire, rents, etc., of the wife's property were primarily community, but inasmuch as the statute provides in partition proceedings, this being one, for the judgment, if against the defendant, to be for the value of the property recovered "and the value of the fruits, hire, revenue, or rent thereon," it was held that such judgment was an entirety, and the value of the hire belonged to the owner of the property. While the result of that case is most salutary, it seems wholly unnecessary that the court should have so severely taxed the elasticity of the law of married women's property rights, as an excuse for reaching a conclusion for which a better reason was apparent. Had the court decided the hire to have been community, it could never have held that a wrongdoer could, by obtaining possession of the wife's property, appropriate its use and hire, and profit by his own wrong.⁸⁰ The wife in such case ought to recover, not because the rents and hire are hers, but because the wrongdoer cannot retain them; they are hers rather than his. A husband could recover them for the same reason. No more than a person seize exempt property and retain its possession

Gas & P. R. Co. v. Medaris, 64 Tex. 262; *Lee v. Turner*, 71 Tex. 264, 10 W. 149; *San Antonio & A. P. Ry. Co. v. Flato*, 13 Tex. Civ. App. 35 S. W. 859; *Galveston, H. & N. Ry. Co. v. M. W.*--16.

S. A. R. Co. v. Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647.

⁷⁹*Carr v. Tucker*, 42 Tex. 330.

⁸⁰*Blum v. Light*, 81 Tex. 414, 16 S. W. 1090.

until the revenues discharged his demand. If we view the holding of the court in this case as we should,—as an exposition of the law as applied to the particular facts there given,—then the conclusions are eminently correct. However, if the question were to arise at the instance of one not in the wrong, a very different result might be reached.⁸¹

§ 231. Mutations.

The changes and mutations which separate property may undergo by virtue of natural growth and development, or by exchange, can in nowise affect its status. The new acquisition in case of an exchange immediately assumes the same status as that for which it is taken. Otherwise it would result in denying to the wife the right to alienate her property for cash or other property, save at the cost of losing it. She could not market her farm products, nor sell her surplus lands, no matter what the emergency; neither could she lend her money without transferring the principal as well as the interest to the community. No exchange, however desirable, could be made. Such an absurd state of things is not in consonance with the right to own property. The right to alienate freely is one of the most valuable incidents of ownership. True, the statute does not in express terms declare that property taken in exchange for separate property shall likewise be separate, but no other rule would be rational. She may exchange for anything in which property rights may exist, and her title to the thing received is as perfect as it was to that given. It is only required of her that she be able at all times to point definitely to her property; that is, to follow it through all of its changes and mutations, and to show that her funds have alone entered into its acquisition.⁸²

§ 232. Presumptions of Community; Burden of Overcoming.

The presumption arising upon the acquisition of property

⁸¹See *Carlisle v. Sommer*, 61 Tex. 124.

⁸²*Rose v. Houston*, 11 Tex. 324; *Chapman v. Allen*, 15 Tex. 278; *Hall v. Hall*, 52 Tex. 294; *Glasscock v. Hamilton*, 62 Tex. 143; *Montgomery*

v. Brown, 1 Tex. App. Civ. Cas. (White & W.) § 1303; *Ratto v. Holland*, 2 Tex. App. Civ. Cas. (Wilson) § 470; *Clafflin v. Pfeiffer*, 7 Tex. 469, 13 S. W. 483; *ante*, §§ 224, 226, 228, 229.

during marriage, that it is community property, is very strong, and the most satisfactory evidence will be required to overcome it. The burden of establishing the separate character of property, when this presumption obtains, is, of course, upon him who asserts it.⁸³ It may be that because of the relation of the parties a higher degree of proof is here required than in ordinary cases. But evidence which "reasonably satisfies" the mind is sufficient. It would be improper to charge that more than this is required.⁸⁴

This presumption does not obtain, however, if the conveyance limit by apt words the property to the use of the wife.⁸⁵ Such recital is sufficient to vest the title in the wife according to the instrument of conveyance, subject, of course, to impeachment upon proof that funds other than the wife's entered into the purchase. And here the burden is not upon the wife to sustain the deed, but upon the party asserting its invalidity.⁸⁶ It can hardly be said that the wife can maintain any sort of possession of property unaccompanied by the character of conveyance mentioned, such as would be sufficient to rebut the presumption that the property was community. Even if it be hers in fact, as against her husband she is not entitled to its possession. Possession further than as an evidence of acquisition has nothing to do with determining the ownership. The question is, When was the property acquired? If during marriage, there is presumption of community, until such is overcome by recitals in the conveyance or proper proofs. It will be seen then, that in cases of personal property where by law no written conveyance is required, there can be no presumption that such is the wife's separate property, unless, as in cases of real prop-

⁸³Gilliard v. Chessney, 13 Tex. 337; Chapman v. Allen, 15 Tex. 278; Schmeltz v. Garey, 49 Tex. 49; Claffin v. Pfeiffer, 76 Tex. 469, 13 S. W. 483; Tompkins v. Williams, 7 Tex. Civ. App. 602, 25 S. W. 158; *ante*, 179, 180, 182.

⁸⁴See Thompson v. Wilson (Tex. Civ. App.) 60 S. W. 354; Torrey v. Cameron, 73 Tex. 583, 11 S. W. 840;

Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Edwards v. Osman, 84 Tex. 656, 19 S. W. 868.

⁸⁵McCutchen v. Purinton, 84 Tex. 603, 19 S. W. 710; *ante*, § 180; Purinton v. Gunter, 3 Tex. Civ. App. 525, 22 S. W. 1008.

⁸⁶Evans v. Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350; Batte v. Beck, 70 Tex. 754, 8 S. W. 544.

erty, a written conveyance containing proper recitals be taken. Thus, the putting of the wife's brand upon animals acquired during coverture raises no presumption that they are hers, unless the record of her brand in some way discloses her separate rights.⁸⁷

The presumption of community makes a *prima facie* case that property is of that estate, and will prevail in the absence of rebutting evidence.⁸⁸ The rebutting evidence must do more than to raise a strong probability of the separate character of the property; it must identify it as having been acquired by the wife in one of the modes recognized by law.⁸⁹

This rule that the burden is upon the wife to establish her separate right is not controlled by the statute prescribing that where property is seized and taken from the possession of a claimant the burden of proof shall be upon the plaintiff. In such case, when it appears that the property seized was acquired during coverture, the *prima facie* case is made, and the burden then shifts to the wife to establish her claim to the property.⁹⁰

§ 233. Innocent Purchasers of Her Property.

Where her property stands in the name of the community, and is presumptively of such estate, purchasers from the husband having no notice of her rights are to be protected, since they may rely upon the title's being where it appears to be.⁹¹ Even if the deed be to the wife,—not limited to her separate use,—a purchaser at execution sale against the husband, having no notice of the wife's separate interests, acquires a good title,⁹² and al-

⁸⁷*Rhodes v. Alexander*, 19 Tex. Civ. App. 552, 47 S. W. 754. But see *Schneider v. Fowler*, 1 Tex. App. Civ. Cas. (White & W.) § 858.

⁸⁸*Rhodes v. Alexander*, 19 Tex. Civ. App. 552, 47 S. W. 754; *Byrn v. Kleas*, 15 Tex. Civ. App. 205, 39 S. W. 980.

⁸⁹*Albrecht v. Albrecht* (Tex. Civ. App.) 35 S. W. 1076; *ante*, §§ 182, 183; *Kimberlin v. Westerman*, 75 Tex. 127, 12 S. W. 978; *McDougal v. Bradford*, 80 Tex. 558, 16 S. W. 619;

Owens v. Hord, 14 Tex. Civ. App. 542, 37 S. W. 1093, S. C. on later appeal, 20 Tex. Civ. App. 21, 48 S. W. 200; *Thompson v. Wilson* (Tex. Civ. App.) 60 S. W. 354.

⁹⁰*Simpson v. Texas Tram & Lumber Co.* (Tex. Civ. App.) 51 S. W. 655.

⁹¹*Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Malry v. Grant* (Tex. Civ. App.) 48 S. W. 614.

⁹²*Cline v. Upton*, 56 Tex. 319; *Wallace v. Campbell*, 54 Tex. 87.

gh such purchaser be the creditor, and credit the bid upon execution, he is yet a bona fide purchaser, and entitled to protection. But an attaching creditor has no such advantage.⁹³ A tradesman who furnishes material for improving such property under similar circumstances stands upon the same plane as bona fide purchasers for value.⁹⁴ Purchasers of her notes and stock certificates⁹⁵ from her husband, where they are not limited to her private use, take the title upon the same principle.⁹⁶ Where her property stands in the name of her husband, or in her own name under such circumstances as to raise a presumption that it is community, and a sale is threatened by a creditor of the husband, equity will restrain such sale, and prevent the loss of a possible innocent purchaser from attaching.⁹⁷

Liability and Charges.

The extent of the liability of the wife's separate property has long been considerably noticed. The matter of the liability of her property is a question controlled almost entirely by statute. Though not altogether, for she may mortgage it and it is binding while she herself is not. But to be sure, where she herself encumbers her property, unless it be exempt by law, is also liable. Her estate is liable to all the burdens of taxation, general and special, that other persons' estates are. It may be taken for the payment of the debts which she is by law authorized to contract, as for necessaries for herself and children, and for expenses incurred for the benefit of her separate property, all of which have been noticed, for her acts amounting to tort, and for the expenses incident to the confinement and maintenance of her insane husband where he has no estate of his own,⁹⁸ and probably in other cases.

But it is not liable for the husband's debts or contracts, though they be concerning her estate,⁹⁹ and even though

S. Brown Hardware Co. v. Brown, 10 Tex. Civ. App. 461, 32 S. W. 178.

Wells v. Hord, 14 Tex. Civ. App. 1093, S. C. on later appeal, 10 Tex. Civ. App. 21, 48 S. W.

⁹³*Anderson v. Waco State Bank*, 92 Tex. 506, 49 S. W. 1030.

⁹⁴See *ante*, § 39.

⁹⁵*Roe v. Dailey*, 1 Posey Unrep. Cas. (Tex.) 248.

⁹⁶Rev. Stat. art. 2747.

⁹⁷See *ante*, §§ 59, 60.

they be necessary for the preservation of such estate.¹⁰⁰ Early decision of *Milburn v. Walker*, 11 Tex. 329, cited in 1 Prob. Guide, at page 474, holds differently, but is not now law. To charge it, the debt must have been contracted by wife personally, or by someone under her directions.¹ The services of the husband bestowed in good faith upon the wife's property give creditors no rights therein, even though his personal earnings are community, since it is his duty to care for, control and manage the same.²

§ 235. Conflict of Laws.

Where the wife resides abroad, and owns property here, her capacity to contract and bind herself or her property, being a personal capacity, is determined by the law of her domicil, and property here held liable or not accordingly.³

¹⁰⁰*Smith v. Powell*, 5 Tex. Civ. App. 373, 23 S. W. 1109.

¹*Ruiz v. Campbell*, 6 Tex. Civ. App. 714, 26 S. W. 295; *Adamson v. Shiel*, 4 Tex. App. Civ. Cas. (Willson) § 294, 18 S. W. 464; *Eager v.*

Morris, 1 Tex. App. Civ. Cas. (V & W.) § 177.

²*Kelly*, *Contr. Mar. Wom.* 149

³*Merrielles v. State Bank*, 5 Tex. Civ. App. 483, 24 S. W. 564, *ante*, §§ 34, 208.

CHAPTER XV.

TRUSTS.

Generally; Definition.	§ 240. — Notice by Recitals in Deed.
Trusts for Married Women.	§ 241. — Evidence of; Parol.
In Contemplation of Marriage.	§ 242. — Quantum of Proof Required.
Resulting Trusts.	

Generally; Definition.

is no part of the present chapter to enter into an extensive discussion of trusts generally. This is a proper subject for texts upon that branch of the law. It is doubtful if the law of trusts has any special applicability to the law of married women, for, since our married women may now own property without the intervention of trustees, much of the old-time importance attached to the subject has passed away. In the general enlarged sense, a trust is the right to receive the profits, and the possession of the land in equity. No set of words or phrases is requisite to the raising of trusts where the intention is clear.

Trusts for Married Women.

Since the owner of separate property does not take the revenues, the order is that trust estates for the benefit of wives are not of very frequent occurrence. By this method, not only the corpus of the property, where such is the intention of the donor or donor, is reserved to the beneficiary, but the rents and revenues also. It is a common error among those not of our profession to suppose that a gift or conveyance to a married woman vests with it a right upon her part to take to herself whatever increase or profits or revenues there may arise out of such estate. Were it once understood that the contrary of this is the

[illegible]

228 In Contemplation of Marriage.

If a married woman contemplates a conveyance of her estate in trust for the benefit of a third party, free from the control of her future husband, and from all liability for debts and the operation, consolidation, and effects of the marriage with her husband, with those exerted after coverture of the husband. As in the preceding case, the trust would cease upon the death of the husband, whose statutory rights the instrument would not violate. The making of such conveyance, and reserving the property therein, is the intention to protect from the husband, and that a marriage is contemplated. It is not intended to intimate here that conveyances in trust may not be made for the beneficial use of anyone, but only the effect of those protecting married women, or those contemplating marriage, against their husbands, are noticed. In this and the preceding section the woman may herself be the party grantor in such instrument. She may convey her estate upon such a trust, reserving the fruits, revenues, and profits to herself against her husband's control; and in such a case no one will deny that upon the death of her husband her former estate will again become hers as if no trust had been created therein.

§ 239. Resulting Trusts.

Another trust, resulting to the wife, arises where another purchases with means belonging to her, taking the conveyance in his own name. Here the holding is in trust for the wife, whose means have entered into the purchase.¹ This is ordinarily known as a resulting trust. Where the purchase is by the husband and the conveyance taken in his name, the title is apparently in the community, and as to bona fide purchasers and contract lien creditors without notice she is held to this apparent title; as to all others, she may assert the trust arising in her favor.²

If the conveyance be taken in the name of the wife, yet not limiting the property to her separate use, nor by apt words indicating her separate rights therein, the like presumption obtains, and, her title being only equitable, she cannot assert it against one who for value without notice acquires the legal title.³ The wife's rights in such cases are not subject to the registration laws,⁴ nor are they created by agreements made prior or subsequent to the acquisition of the property; but the transaction must be such that a trust arises at the time.⁵ This trust is not the result of contract at all. It arises by implication of law, if at all, at the very moment of the acquisition, because her means have entered in whole or in part into the purchase. And this is true whether used with or without her consent. But it is not sufficient to create a trust in favor of the wife for the husband to purchase with means belonging to himself or the community, merely intending the purchase for the wife. He must do something to evidence that intention to make the property hers, or there must exist other reasons besides his mere inten-

¹Carter v. Bolin, 30 S. W. 1084, S. C. later decision, 11 Tex. Civ. App. 283, 32 S. W. 123; Hunt v. Matthews (Tex. Civ. App.) 60 S. W. 674.

²Ross v. Kornrumpf, 64 Tex. 390; Stoker v. Bailey, 62 Tex. 299; Yoe v. Montgomery, 68 Tex. 338, 4 S. W. 622; Blum v. Rogers, 71 Tex. 668, 9 S. W. 595; Evans v. Welborn, 74 Tex. 530, 12 S. W. 230.

³McKamey v. Thorp, 61 Tex. 648. See *ante*, § 233.

⁴Blankenship v. Douglas, 26 Tex. 225; J. S. Brown Hardware Co. v. Marwitz, 10 Tex. Civ. App. 461, 32 S. W. 78.

⁵Parker v. Coop, 60 Tex. 111; Cunio v. Burland, 1 Posey Unrep. Cas. (Tex.) 469.

tion, to create a trust in her favor.⁶ Nor will a trust result in her favor merely because his purchases are with funds loaned him from the wife's separate estate,⁷ nor merely because the husband paid for lands in part by means of drafts upon his wife, which she honored and paid,—such transaction constituting them debtor and creditor only.⁸

§ 240. — Notice by Recitals in Deed.

The case of *Montgomery v. Noyes*, 73 Tex. 203, 11 S. W. 138 is one that may be profitably examined upon this subject. It is in apparent, though not real, conflict with the long-established rule of notice announced in *Cooke v. Bremond*, 27 Tex. 457. A deed to land was executed to Josiah T. and Amelia Harrell, his wife, reciting in the conveyance that it was made “for and in consideration that the heirs and legal representatives,” of whom Mrs. Harrell was one, “of Isaac Batterson, deceased, have withdrawn all claim in and to the headright survey of James S. Holman, south of and adjoining the 2-league grant of John Austin.” The deed was duly recorded. The husband subsequently conveyed the land to others, signing the wife's name, but she in no other manner joined in the conveyance. In a dispute between the purchasers from the husband and the heirs of the wife, the court had occasion to discuss the clause above quoted as notice to the purchasers of the equities of the wife in the land. The one side contending that the deed being to the husband and wife during marriage, the land was presumptively community, and the husband alone authorized to convey it; while the other, that the recitals in the deed of conveyance which was of record were sufficient to put purchasers upon notice that the wife's property had paid for the land, and that she was the equitable owner of the same. The court said: “The effect of the deed . . . was to vest the legal title to one undivided half of the land conveyed in each of the grantees. . . . But the facts in proof show

⁶*Johnson v. First Nat. Bank* (Tex. Civ. App.) 40 S. W. 334.

⁷*Levy v. Williams*, 20 Tex. Civ. App. 651, 49 S. W. 930, 50 S. W. 528.

⁸*Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840.

at Mrs. Harrell's interest in her separate right in the location the Batterson certificate constituted the consideration for which the deed was executed,—not her interest in the Batterson certificate, but in its location. That interest was surrendered, and preference given to the location of the Holman certificate in consideration of the deed from Baker, who at the time owned the Holman location. These facts put the equitable title to all the land conveyed by the deed in her. . . . The deed recited sufficient facts concerning the consideration to put parties upon inquiry, and to affect them with the consequences of notice of the fact that she owned the land in her separate right. . . . This recital indicated that, though the conveyance was to Harrell and wife, there was a resulting trust in favor of the parties making the relinquishment, whoever they might be, and it was the duty of purchasers to inquire and ascertain who the parties were." The distinction sought to be made between this holding and the doctrine announced in *Cooke v. Bremond*, 27 Tex. 457, and *Kirk v. Houston Direct Nav. Co.* 49 Tex. 213, and others, to the effect that a recital in the conveyance that the wife had made the payment of the purchase money is not sufficient to put innocent purchasers from the husband upon inquiry concerning her rights, is this: In the one instance, the recital not only declares that the consideration was paid by the wife, but that the same was paid out of her separate estate; while in the others, the mere recital that the wife had paid the consideration does not indicate that the same was made from her separate funds, so as to make the purchase hers, or even to raise a trust in her favor in the land. The law supposes a payment by the wife to be out of community funds the same as though it were made by the husband. But the court in the case we are discussing further said that "the recitals in the deed were sufficient to put persons of ordinary prudence upon inquiry, and that defendants [those claiming under purchase from the husband] must be held to have had notice of what they might have learned by such inquiry." It is gratifying that our supreme court has thus recognized a rule that will in a measure check the trend of the doctrine announced in *Cooke v. Bremond*, 27 Tex. 457, and others, which, to say the least, is of very-questionable soundness. To say that a recital in a deed that the wife had paid the pur-

chase money is not sufficient to put a purchaser upon inquiry as to her rights is a proposition of law contrary to the experience of everyone upon the facts. For we all know that, upon being confronted with such a recital, an ordinarily prudent person's first inquiry would be directed to the possible equities of the one whose means had paid for the land; and it is but reasonable to say that a recital that the wife paid the purchase money is equivalent to saying also that the means used were hers. The same recitals in a deed to the husband would not have a like meaning at all, for he legally owns and controls another estate than his own, *viz.*, the community.

§ 241. — Evidence of; Parol.

Our statute of frauds does not preclude the establishment of a trust in lands by parol. The clause of the statute requiring a writing refers only to such suits as have for their object a recovery upon a "contract for the sale of real estate or the lease thereof for a longer term than one year." As the establishment of a trust is neither a contract for a sale, nor a lease of the lands, it cannot be said to be within the statute. No provision requires the proof by writing of the creation of a trust. And with us, express and implied or constructive trusts—for they all stand upon the same footing—may be shown by parol. The contract creating the one, and the transaction from which the other arises, may thus be shown.⁹ If the trust be engrafted upon the instrument, purchasers of course take with notice. Or as in the preceding section, if the conveyance contains recitals sufficient to elicit inquiry, a notice of what would reasonably result from such inquiry is chargeable. It is hardly necessary to again say that these secret trusts cannot be shown to the detriment of innocent purchasers for value.

§ 242. — Quantum of Proof Required.

While it is the settled law of this state that a trust can be

⁹James v. Fulcro, 5 Tex. 512; Mead v. Randolph, 8 Tex. 191; Miller v. Thatcher, 9 Tex. 482; Bailey v. Harris, 19 Tex. 109; Cuney v. Dupree, 21 Tex. 211; Dunham v. Chat-

ham, 21 Tex. 231; Grooms v. Rust, 27 Tex. 231; Brotherton v. Weathersby, 73 Tex. 471, 11 S. W. 505; Carleton v. Roberts, 1 Posey Unrep. Cas. (Tex.) 587.

shown by parol evidence to have attached to the legal title, it is also well settled that the same cannot be established except by clear and satisfactory testimony.¹⁰ And this, of course, casts upon the party seeking to establish the trust the burden of proving it. By clear and satisfactory testimony is not meant that the fact of trust must be established beyond a reasonable doubt,¹¹ for this would be requiring too great strictness. It is only necessary that the fact be satisfactorily established, for the evidence which will have the effect of changing the terms of a written instrument should be strong and convincing. As to what will amount to this strong and convincing proof no one can say. Considering all the circumstances, whatever satisfies the mind will satisfy the law. However, it would be improper for the court to instruct the jury that the parol trust must be established with certainty by the proof, as this would be misleading, and would imply that by certainty was meant the absence of doubt. It would be proper in such a case to instruct the jury as to the legal effect of the conveyance, and that the parties to it are presumed, in the first place, to have intended that it should have that effect, but that they should find that a trust was intended provided the other evidence be sufficient to overcome that presumption, and to reasonably satisfy them that such was in fact the intention.¹² This is the *quantum* of proof required in such cases. Any charge to the jury telling them "that the clearest and most positive proof was necessary,"¹³ or "that more than a preponderance of evidence" was required,¹⁴ would necessarily be wrong. As propositions of rules in equity they may be correct, but it is improper to give them in charge to a jury.¹⁵ A court can safely go no further than to tell the jury that if they believe by a preponderance of proof that a trust has been shown they will so find.¹⁶

¹⁰Mead v. Randolph, 8 Tex. 191; Hall v. Layton, 16 Tex. 262; Agricultural, Mechanical, & Blood-stock Asso. v. Brewster, 51 Tex. 257; Cunio v. Burland, 1 Posey Unrep. Cas. (Tex.) 469.

¹¹Markham v. Carothers, 47 Tex. 21.

¹²Howard v. Zimpelman (Tex.) 14 S. W. 59.

¹³Neyland v. Bendy, 69 Tex. 711, 7 S. W. 497.

¹⁴Prather v. Wilkins, 68 Tex. 187, 4 S. W. 252.

¹⁵Miller v. Yturria, 69 Tex. 549, 7 S. W. 206.

¹⁶Baylor v. Hopf, 81 Tex. 637, 17 S. W. 230.

CHAPTER XVI.

HOMESTEAD AND OTHER EXEMPTIONS.

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| § 243. Constitutional Provisions. | § 258. Sale, Generally. |
| § 244. Statutes: Their Scope and Object. | § 259. Sale by Husband: Adjusting Equities. |
| § 245. Nature of Her Interest. | § 260. — for Roads, Streets, etc. |
| § 246. What is Homestead: Residence. | § 261. Contracts of Wife to Sell. |
| § 247. — Dedication. | § 262. Cannot be Mortgaged. |
| § 248. — Further of Intention. | § 263. Mechanics' Liens. |
| § 249. — in Separate Tracts or Lots. | § 264. Other Liens for Improvements. |
| § 250. — Whether Rural or Urban. | § 265. Purchase Money. |
| § 251. — and Further of the Limitations as to Quantity and Value. | § 266. "Other Liens." |
| § 252. — the Estate to Support. | § 267. Taxes Due upon the Homestead. |
| § 253. — Business Homestead. | § 268. Proceeds of Voluntary Sale Exempt, When. |
| § 254. — Things Affixed to the Realty. | § 269. Proceeds of Insurance on. |
| § 255. — Issues, Rents, and Damages. | § 270. Abandonment of Homestead. |
| § 256. The Right to Select. | § 271. — If in Fraud of the Wife. |
| § 257. Designating Homestead: Statute. | § 272. Husband and Wife Living Apart. |
| | § 273. Miscellaneous Exemptions. |

§ 243. Constitutional Provisions.

"The homestead of a family shall be, and is, hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if

married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien shall have been created by the husband alone or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void."¹

"The homestead not in a town or city shall consist of not more than 200 acres of land, which may be in one or more parcels with the improvements thereof; the homestead in a city, town, or village shall consist of lot or lots, not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family; provided, also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired."²

"The homestead of a family not to exceed 200 acres of land (not included in a town or city) or any town or city lot or lots in value not to exceed two thousand dollars, shall not be subject to forced sale, for any debts hereafter contracted, nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, in such manner as the legislature may hereafter point out."³

The provision of the Constitutions of 1861 and 1866 was identical with the foregoing, while that of 1869 was as follows: "The homestead of a family, not to exceed 200 acres of land (not included in a city, town, or village), or any city, town, or village lot or lots, not to exceed five thousand dollars in value, at the time of their destination as a homestead, and without reference to the value of any improvements thereon, shall not be subject to forced sale for debts, except they be for the purchase thereof, for the taxes assessed thereon, or for labor or materials expended

¹Const. 1876. art. 16, § 50.

²Const. 1845, art. VII. § 22.

³Ibid. art. XVI. § 51

thereon; nor shall the owner, if a married man, be at liberty alienate the same, unless by consent of the wife and in such manner as may be prescribed by law."

§ 244. Statutes; Their Scope and Object.

The statute defines the homestead in words almost identical with the section of the Constitution above quoted,⁴ and in suitable language exempts the same from every species of forced sale save for the purchase money, for taxes due thereon, and for work and material used in constructing improvements thereon.

Back of these provisions one cannot fail to discern the object of the framers of our Constitution and statutes. Very far have they gone in their efforts to vouchsafe to the wife a shelter for herself and children against the improvidence of the husband and the greed of creditors. Observing only the rights of those who in a measure supply that shelter, and the demands of the sovereign, the wife is given the power to continue under its protection at any hazard. It is not for the husband, nor yet for their children, that the law has thus interposed; but, possibly in a measure to ameliorate the burdens imposed upon her by our marital laws, it has graciously permitted her the privilege of saying whether or no she will part from it. As was said by Justice Moore in *Iken v. Olenick*, 42 Tex. 195: "The leading and fundamental idea connected with a homestead is unquestionably associated with that of a place of residence for the family, where the independence and security of a home may be enjoyed, without danger of its loss, or harassment and disturbance by reason of the improvidence or misfortune of the head or any other member of the family. It is a secure asylum of which the family cannot be deprived by creditors. Within its sanctuary, however urgent may be their demands, they cannot intrude." In matters of sale and contracts for improvements the wife is the residuary of all power. Without her consent, her home can never be taken from her, except it be for unpaid purchase money, or the taxes due thereon. This ample protection of the law extends to the business as well as the residence homestead of the family.

⁴Rev. Stat. art. 2396.

⁵Ibid. arts. 2395, 2401.

§ 245. Nature of Her Interest.

The wife's homestead right is a peculiar right. It is, of course, usually in property a part of the realty, but it is in no sense dependent upon her title to the realty. She may own the fee, or she may have no title whatever therein. Her rights arise immediately when the property shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family; in other words, as it is more frequently expressed, immediately upon the dedication of the property for homestead purposes. But this is liable to be misunderstood. There can be no homestead rights until there is a home to exempt. This does not mean, however, that a house shall have been occupied, or even built; but that there must at least have been a preparation to improve or occupy, and this must be of such a character, and to such an extent, as to clearly manifest the intention to make of the place a home for the family.⁶ Her rights may attach, although she may not actually reside upon the property,⁷ for actual, physical occupancy is in no sense the test of the rights. It must not be understood that the exemption is wholly to the wife, for it is the homestead of the family that is protected, and the lawmakers have considered that the best method of protecting it to the family is by conferring upon the wife the peculiar rights given her. The family may consist of father and children only.⁸ This peculiar right continues so long as the property is occupied by the family as a home, and in some instances even longer. It cannot be assigned, nor sold, nor will it descend. She may relinquish it even, for a consideration, or abandon it. Mr. Freeman, in speaking of the homestead right in connection with the estate upon which it is based, says that it is more analogous to an estate by entirety than that of joint tenancy, they having alike the four unities of interest, title, time, and possession, while the estate by entirety has the fifth unity of person; that this, unlike an estate by joint tenancy, can be vested in but two natural persons, who are regarded

⁶Franklin v. Coffee, 18 Tex. 413.

⁷Lane v. Philips, 69 Tex. 240, 6 S.

⁸Henderson v. Ford, 46 Tex. 627; W. 610.

Moores v. Wills, 69 Tex. 109, 5 S. W. 675.

as but one in law; who are each seised, not of an undivided moiety of the whole, but of an entirety, and seised *per tout*, but not *per my*; who cannot alienate separately, but must alienate jointly; who cannot sever at pleasure, but hold an estate which, while it remains theirs, is inseverable; who cannot have partition unless in a divorce proceeding severing their matrimonial relations; and who have not the right of survivorship, but upon decease of either spouse the other continues to hold the entire homestead estate as such.⁹

§ 246. What is Homestead; Residence.

The homestead is the place of the family residence, or the property dedicated as such.¹⁰ What amounts to a residence or dedication will be more specifically noticed in a subsequent section. The subject is not capable of definition in a sentence, but for practical purposes is better defined by discussing the various elements, essentials, and limitations attached to the right. Generally, the homestead is the place within the constitutional limits as to quantity and value, used by the family for the purposes of a home, or as a place to exercise the calling or business of the head of a family. But to be practical we must see what this means by going into details.

§ 247. — Dedication.

The dedication and occupancy of a home are not the work of a moment, and no precise stage of such continuous act or acts can be denominated the beginning of such exemption, with the assurance of its being applicable to all cases alike. The time at which the right attaches depends upon a variety of circumstances. It is the place of the home of the family, and when fairly selected, with the intention to occupy it for such purpose, accompanied by acts of preparation indicating such intention, from that moment, when ascertained, it is homestead. As to what acts will indicate that intention, they are as varied as the circumstances of each case are varied. A sale of the former home

⁹Freeman, Co. Ten. & Parti. §§ 49, 64, 86.

¹⁰Holliman v. Smith, 39 Tex. 357; Philleo v. Smalley, 23 Tex. 503.

stead and purchase of property with the intention to make it the family homestead, accompanied by an occupancy by part of the family with a portion of the household effects, though the wife may be absent in another state;¹¹ or other acts, such as erection of buildings for the family residence,¹² even though the husband may, for lack of means, be forced to suspend the construction of such buildings for a time, where he does not abandon the intention;¹³ or by preparation to occupy, such as clearing a farm and placing the lumber upon the premises for a house;¹⁴ planting upon the land and purchasing materials for improving it;¹⁵ erecting a barn and stable;¹⁶ placing household goods in the house, and arranging with the occupant tenant for possession, in contemplation of marriage and use of such property,¹⁷—all these, and any other similar acts of preparation showing an immediate and bona fide intention of occupying the property for the purpose of a home, show a sufficient dedication of the same from the time of such purchase and preparation.¹⁸ Of course, actual occupancy is the best possible evidence of homestead rights; for, when property is thus used for the purposes of a home, none can shut their eyes to the fact that it is such, nor will the acts or intentions of the parties affect its status as exempt property.¹⁹ The occupancy may be of only a portion of the lands or buildings actually exempted by law. If the nature of the property be such as that an occupancy of a part fairly amounts to an occupancy and use of all, then it is immaterial that the entire buildings or lands are not occupied, physically,

¹¹*Moore v. Wills*, 69 Tex. 109, 5 S. W. 675.

¹²*Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578.

¹³*Dobkins v. Kuykendall*, 81 Tex. 180, 16 S. W. 743.

¹⁴*Moreland v. Barnhart*, 44 Tex. 275; *Barnes v. White*, 53 Tex. 628.

¹⁵*White v. Wadlington*, 78 Tex. 159, 14 S. W. 296.

¹⁶*Ellerman v. Wurz* (Tex.) 14 S. W. 333.

¹⁷*Parr v. Newby*, 73 Tex. 468, 11 S. W. 490.

¹⁸*Anderson v. McKay*, 30 Tex. 186; *Franklin v. Coffee*, 18 Tex. 413; *Bell v. Greathouse*, 20 Tex. Civ. App. 478, 49 S. W. 258; *Gallagher v. Keller* (Tex. Civ. App.) 30 S. W. 248, S. C. 4 Tex. Civ. App. 454, 23 S. W. 296; *Watkins v. Davis*, 61 Tex. 414; *Schneider v. Bray*, 59 Tex. 668; *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212, 13 S. W. 28; *Reinstein v. Daniels*, 75 Tex. 640, 13 S. W. 21; *Burgher v. Henderson*, 9 Tex. Civ. App. 521, 29 S. W. 522.

¹⁹See *post*, § 248.

by the homesteader.²⁰ But buildings and structures entire arated from the homestead, and not forming a part there being used for homestead purposes, will not be included though they may in fact be occasionally used by the family. But where the family actually own and occupy a homestead, their intention to destinate another, even when accompanied by the acts of preparation mentioned, will not have the effect of emptying the new home to them, for a family cannot be protected in the enjoyment of two homesteads at the same time.²² Every property is occupied and used as the homestead of the family is not only such in fact, but in law, and the homesteader's intention or declarations²³ have nothing to do with it.²⁴

§ 248. — Further of Intention.

While in determining the status of property claimed exempt under the homestead law, intention may often be, a matter of vital importance, it is not always to be considered of controlling influence, or even considered at all. For, as just stated, one's intention contrary to the actual facts and uses of property will not affect it. If use makes it homestead intention to other property will not destroy the exempt character of the property used. And intention accompanied by acts of preparatory change the homestead will not protect the proposed homestead until the conduct and acts amount to an abandonment of the old one,²⁵ even if the intention to occupy the proposed property be bona fide.²⁶ Intention can only be considered where no homestead exists by actual use and occupancy. Here intention must, and should, be looked to, for if it were not so an insolvent might never be able to secure a homestead. But an intent

²⁰King v. C. M. Hapgood Shoe Co. 21 Tex. Civ. App. 217, 51 S. W. 532; Tenney v. Wessell (Tex. Civ. App.) 26 S. W. 436.

²¹See *post*, § 249. Henry v. Corpus Christi Nat. Bank (Tex. Civ. App.) 44 S. W. 568.

²²Johnston v. Martin, 81 Tex. 18, 16 S. W. 550; Sharpe v. Johnston (Tex.) 19 S. W. 259.

²³Rose v. Blakenship (Tex.) 101 S. W. 101.

²⁴Adams v. Kaufman, 11 Tex. Civ. App. 179, 32 S. W. 712.

²⁵Allen v. Whitaker (Tex. Civ. App.) 27 S. W. 507.

²⁶Archibald v. Jacobs, 69 Tex. 177, 16 S. W. 177.

abandon property which is in fact homestead does not amount to abandonment,²⁷ so as to authorize the acquisition of another by mere intention. But the fact that the owner also owned other property would not preclude him from designating a lot as homestead, if he entertained such intention, and was making appropriate preparation to carry such intention into effect.²⁸

Again, mere intention alone is never sufficient to clothe property with the attributes of a homestead; there must be some acts of preparation to put such intention into effect.²⁹ There cannot be the preparation of a home without this intention, but there may be the intention which may never be carried out, and hence no homestead ever be acquired. If rights of others attach to property destined by the husband and wife to be their future home, but such destination goes no further than a mere secret intention upon their part, unaccompanied by acts of preparation to reasonably put such persons upon notice of their intention and rights, the homestead claim will avail them nothing.³⁰ But should the question of intention become material, which it often may, the same may be shown by the acts and declarations of the party, and even by his conduct after such property has been sold under execution, such as building a house and removing with his family thereon.³¹

§ 249. — in Separate Tracts or Lots.

Whether the home be rural or urban, the homestead may consist of separate tracts or parcels, not exceeding 200 acres in the one case, and of lot or lots not exceeding in value \$5,000 at the time of their designation, in the other. The parcels need not be adjoining or contiguous to the one upon which are situated the

²⁷Little v. Baker (Tex.) 11 S. W. 549.

²⁸Furtner v. Edgewood Distilling Co. 16 Tex. Civ. App. 359, 41 S. W. 184.

²⁹Muckelroy v. House, 21 Tex. Civ. App. 673, 52 S. W. 1038.

³⁰Bente v. Lange, 9 Tex. Civ. App. 328, 29 S. W. 813; Wolf v. Butler, 8 Tex. Civ. App. 468, 28 S. W. 51; Collier v. Betterton, 8 Tex. Civ. App.

479, 29 S. W. 490; Houston & G. N. R. Co. v. Winter, 44 Tex. 597; Brooks v. Chatham, 57 Tex. 31; Swope v. Stantzenberger, 59 Tex. 387; Fort v. Powell, 59 Tex. 321; Gardner v. Douglass, 64 Tex. 76; Loessin v. Washington (Tex. Civ. App.) 57 S. W. 990.

³¹Gallagher v. Keller, 87 Tex. 472, 29 S. W. 647.

dwelling house and home of the family, but may be entirely disconnected therewith, and even remotely situated therefrom.³² Neither feet nor miles are the test, but use. This observation is pertinent: The framers of our law had no thought of exempting 200 acres of land in the country, or lots in a town or city to the value of \$5,000, as a home for each family, upon which they might reside when they thought proper; but this exemption is only in the event such lands or lots are used for the purposes of a home, or as a place to exercise the calling or business of the head of a family. The exemption is not of any definite number of acres or value of lots, but of the home, and the measure of acres and value of lots are limitations placed upon that home. Expressions may be found in some of the decisions which seem to indicate that the proviso with reference to the use of the property for home purposes does not apply to the rural homestead. But the better authorities, as well as the proper construction of the language of the section, show unmistakably that it does.³³ The language of the Constitution indicates very clearly that the occupancy and use of a parcel of land not in a town or city will impress that parcel with the homestead character to the extent of 200 acres if it contains so much, but that if the homesteader owns separate and detached parcels, the parcels so detached from that upon which are situated the dwelling house and home must in some way be used for the purposes of a home. It would never do to say that each and every tract of land owned by the husband or wife, no matter how remotely situated with reference to their dwelling house, and regardless of the uses to which the same may be put, would necessarily to the extent of 200 acres be homestead. This would be exempting land that was not homestead in fact; something never contemplated by law. But where the entire constitutional amount is in one tract or in several which are contiguous,³⁴ the use of any part of the same is a dedication of the entire amount. The principle is well stated in a quotation from the case of *Iken v. Olenick*, 42 Tex. 195: "The idea of a home or residence in the country imports that there is con-

³²*Morgan v. Morgan*, 1 Posey Unrep. Cas. (Tex.) 400.

³⁴*Campbell v. Macmanus*, 32 Tex. 442.

³³*Ante*, § 243; *Brooks v. Chatham*, 57 Tex. 31.

nected with it the means and opportunity of following the pursuits of the country. The mere exemption of the residence would ordinarily be of little practicable benefit to the family, as it would probably have to be abandoned, and the family go elsewhere to find employment from which to realize a support. The homestead exemption in the country was therefore extended so as to include 200 acres of the land previously occupied, appropriated, and used in connection with it. The land thus exempted is evidently incident and appendant to, and from the nature of the case forms a part of, the country homestead." It is not required that the family actually cultivate the entire amount of the exemption, or even so use each tract sought to be protected; if the uses of disconnected tracts are similar, and all for homestead purposes, it is sufficient. A renting of one tract as a means of obtaining a partial support therefrom for the family has been said to be a proper use of the homestead.³⁵ But a tract separated from that occupied as a homestead and not used in connection therewith, except that a spring upon it supplies water to the family, is not such use as will make it a part of the homestead.³⁶

To say certainly when separate lots in a town or city are used for homestead purposes is not an easy task. It has engrossed the attention, and evoked the consideration, of our courts as probably no other branch of the homestead law. By construction it is held that the provision that the property may be used for the place of exercising the calling or business of the head of a family applies only to urban homesteads, hence another phase of the subject that further tends to embarrass the consideration of the question.³⁷ We have seen, then, that the homestead in a city or town may consist of lot or lots, and that it is nowhere required that such lots should be contiguous. There are only the limitations as to value and use. From the nature of the case it will be seen that more than the ordinary lot in our cities and towns may be profitably used or actually necessary to the enjoyment of a home. There are to be gardens, orchards, lots, walks, parks, and drives which may not be easily encompassed within

³⁵Baldeschweiler v. Ship, 21 Tex. Civ. App. 80, 50 S. W. 644. But see Haswell v. Forbes, 8 Tex. Civ. App. 82, 27 S. W. 566.

³⁶Nix v. Mayer (Tex.) 2 S. W. 819.

³⁷See *post*, § 253.

the boundaries of one small lot. It may be desirable, or even necessary, that these lots be separated from each other and from the dwelling house, and it has ever been the policy of our laws to consider them as a part of the home, even in such cases, where they were actually used in such a way as to contribute to the proper use and enjoyment of the home place.³⁸ But where the principal use of a detached lot is other than as a home, it will not be protected, even though it does in a measure contribute to the support of the family, as by its rents, pasturage for the family's stock, and the like.³⁹ Where the use of the property is that of rental property principally it is not within the pale of the law, simply because it may aid the head of the family in its support, or even be used occasionally by members of the family for trivial purposes.⁴⁰ For "to protect lots in a town or city not actually occupied by the family residence or its appurtenances, they must be substantially used by the family for home purposes. When they are detached by inclosures from the homestead lot proper, and are improved for the purpose of being leased to tenants, and of thereby producing an income, it is evident they are no longer used as adjuncts of the family residence, and should be no longer exempt from forced sale," and an unimportant subsidiary use for homestead purposes will not affect them.⁴¹ To divide the homestead lot or tracts into lots, streets, alleys, etc., for the purpose of selling may indicate an abandonment of that portion of the homestead, and subject it to liability to forced sale.⁴²

³⁸*Pryor v. Stone*, 19 Tex. 371; *Hancock v. Morgan*, 17 Tex. 582; *Methery v. Walker*, 17 Tex. 593; *Iken v. Olenick*, 42 Tex. 195; *Arto v. Maydole*, 54 Tex. 244; *Medlenka v. Downing*, 59 Tex. 32; *Jacobs v. Hawkins*, 63 Tex. 1; *Axer v. Bassett*, 63 Tex. 545; *Waggener v. Haskell*, 89 Tex. 435, 35 S. W. 1; *Ingle v. Lea*, 70 Tex. 609, 8 S. W. 325; *Anderson v. Sessions* (Tex. Civ. App.) 51 S. W. 874.

³⁹*Allen v. Whitaker* (Tex.) 18 S. W. 160; *Achilles v. Willis*, 81 Tex. 169, 16 S. W. 746.

⁴⁰*Oppenheimer v. Fritter*, 79 Tex. 99, 14 S. W. 1051; *Blum v. Rogers*, 78 Tex. 530, 15 S. W. 115; *Charles v. Chaney* (Tex. Civ. App.) 26 S. W. 169; *Wynne v. Hudson*, 66 Tex. 1, 17 S. W. 110; *Hendrick v. Hendrick*, 13 Tex. Civ. App. 49, 34 S. W. 804; *Heatherly v. Little*, 21 Tex. Civ. App. 664, 52 S. W. 980; *Jones v. Lee* (Tex. Civ. App.) 41 S. W. 195.

⁴¹*Blum v. Rogers*, 78 Tex. 530, 15 S. W. 115.

⁴²*Cullum v. Price* (Tex. Civ. App.) 23 S. W. 711.

§250. — Whether Rural or Urban.

Since the same family is not entitled to both a rural and an urban homestead,⁴³ it then becomes at times very important to be able to say what property is rural and what urban. While the law speaks of lot or lots in a city, town, or village, it does not necessarily mean the incorporated city, town, or village of our statute,⁴⁴ and the expression is probably used in a popular sense as those words are commonly understood. It is not always easy to tell where the unincorporated town or village stops and the country begins. The quantity of land in the tract, its use, proximity to the supposed town or village, and the size and nature of such settlement, are probably questions of importance in determining the answer to such an interrogatory.⁴⁵ Where the land is within the limits of an incorporated town or city, and cut up into lots which are for sale, it is, of course, to be considered urban rather than rural, even though it may be used by the owner for gardening and pasture for his stock.⁴⁶ This discussion has arisen most frequently in those cases where, by an extension of the limits of a town or city, property hitherto rural in its nature has been included within its boundaries. It is within the power of the legislature to provide for the enlargement of the corporate limits of towns and cities so as to include rural property, even against the owner's consent,⁴⁷ and such town or city may upon such land lay out streets, alleys, and all public highways necessary for the public convenience, and thus convert the property into urban property contrary to the owner's wishes.⁴⁸ But until the city has done this,—that is, converted the land into urban property by laying out streets, alleys, and blocks,—or until the owner

⁴³Swearingen v. Bassett, 65 Tex. 267; Keith v. Hyndman, 57 Tex. 425; Posey v. Bass, 77 Tex. 512, 14 S. W. 156; Foust v. Sanger Bros. 13 Tex. Civ. App. 410, 35 S. W. 404; Lauchheimer v. Saunders, 19 Tex. Civ. App. 392, 47 S. W. 543.

⁴⁴Williams v. Willis, 84 Tex. 398, 19 S. W. 683; Hargadene v. Whitfield, 71 Tex. 482, 9 S. W. 475.

⁴⁵Iken v. Olenick, 42 Tex. 195; Pridgen v. Warn, 79 Tex. 588, 15 S.

W. 559; Martin Clothing Co. v. Henly, 83 Tex. 592, 19 S. W. 167; Crisp v. Thrash (Tex. Civ. App.) 52 S. W. 92.

⁴⁶Allen v. Whitaker (Tex.) 18 S. W. 160.

⁴⁷Taylor v. Boulware, 17 Tex. 74; Blessing v. Galveston, 42 Tex. 641; Wilder v. McConnell, 91 Tex. 600, 45 S. W. 145.

⁴⁸Wilder v. McConnell, 91 Tex. 600, 45 S. W. 145.

himself has done so and thus recognized the property as urban rather than rural, it will retain its rural character.⁴⁹ Whether it is converted into an urban homestead is a question of fact determined from the circumstances of the case. The mere extension of the corporate limits of a town or city will not necessarily make it such because the corporate limits may embrace territory that is not a part of the town or city in fact. It should further be made a part of a town or city in fact by cutting up into blocks, streets, and alleys, either by the city or owner.⁵⁰

§ 251. — and Further of the Limitations as to Quantity and Value.

The rural homestead has always been protected to the extent of 200 acres, including the improvements. It was the proper measure to measure the rural homestead by acres rather than value, and to permit improvements thereon to any amount. The limitation upon the urban homestead is that it must not exceed in value \$5,000, at the time of its designation as such,⁵¹ with reference to the value of any improvements thereon. The purpose of the Constitutions of 1845 and 1866 was to permit the improvements upon the urban homestead to be considered in determining its value, which could not exceed \$2,000.⁵² The Constitution of 1869 not only raised the maximum value allowed, but excluded from the computation the improvements. The valuation is determined at the time of their designation as homestead. As already stated, there is no limitation upon the value of the improvements which the owner may place upon his homestead. The law takes no notice of that. It is protected to any amount, regard-

⁴⁹Posey v. Bass, 77 Tex. 512, 14 S. W. 156; Wilder v. McConnell, 91 Tex. 600, 45 S. W. 145; Neeley v. Case (Tex. Civ. App.) 32 S. W. 785; Waggener v. Haskell, 13 Tex. Civ. App. 630, 35 S. W. 711; Clark v. Nolan, 38 Tex. 416; Atkinson v. Phares, 20 Tex. Civ. App. 150, 49 S. W. 653; J. B. Watkins Land & Mortg. Co. v. Abbott, 14 Tex. Civ. App. 447,

37 S. W. 252; Ayres v. Lamb (Tex. Civ. App.) 40 S. W. 1024.

⁵⁰Paris Exch. Bank v. Hule (Tex. Civ. App. 285, 52 S. W. 2

⁵¹See *post*, 253; Lake v. Bou (12 Tex. Civ. App. 660, 35 S. W. Richards v. Nelms, 38 Tex. 44

⁵²*Ante*, § 243; Inge v. Cain, 6 Tex. 75.

of the motives or intention of the owner in thus placing his money in exempt property, and putting it beyond the reach of his creditors. For a man to convert his nonexempt property into a homestead for the purpose of putting it beyond the reach of his creditors is not good morals, but is a wrong for which no remedy exists.⁵³

§ 252. — the Estate to Support.

Ownership of the fee is not essential to the existence of the homestead right, but it is ordinarily attached to some interest in the realty. The homestead rights are the same whether the fee be in the husband, the wife, or the community, or whether it be upon property to which neither owns the fee. The home may even be of such a nature as to be a mere chattel, as where it is built upon leased lands, yet the exemption is perfect.⁵⁴ It follows then, of course, that any sort of title, whether legal or equitable,⁵⁵ will support the claim.⁵⁶ An estate for life,⁵⁷ or a leasehold interest,⁵⁸ or one acquired by limitations,⁵⁹ or an equitable interest in property not paid for,⁶⁰ or an interest in partnership property,⁶¹ or an estate in cotenancy,⁶² are illustrations of the varied estates and interests that will support the claim. The title is unimportant, since the law protects the home whatever and wherever it may be. Yet the claim should be predicated upon some substantial right of present occupancy of the land, to

⁵³King v. C. M. Hapgood Shoe Co. 21 Tex. Civ. App. 217, 51 S. W. 532; Chase v. Swayne, 88 Tex. 218, 30 S. W. 1049.

⁵⁴Cullers v. James, 66 Tex. 494, 1 S. W. 314; Low v. Tandy, 70 Tex. 745, 8 S. W. 620.

⁵⁵Dotson v. Barnett, 16 Tex. Civ. App. 258, 41 S. W. 99.

⁵⁶Smith v. Chenault, 48 Tex. 455.

⁵⁷Silverman v. Landrum (Tex. Civ. App.) 56 S. W. 107.

⁵⁸Wheatley v. Griffin, 60 Tex. 209; Phillips v. Warner, 4 Tex. App. Civ. Cas. (Willson) § 147, 16 S. W. 423; Anheuser-Busch Brewing Asso. v. Smith (Tex. Civ. App.) 26 S. W. 94.

⁵⁹Bridges v. Johnson, 69 Tex. 714, 7 S. W. 506; Hennessy v. Savings & Loan Co. 22 Tex. Civ. App. 591, 55 S. W. 124; Williams v. Galveston (Tex. Civ. App.) 58 S. W. 551.

⁶⁰Lee v. Welborne, 71 Tex. 500, 9 S. W. 471; McShan v. Myers, 1 Posey Unrep. Cas. (Tex.) 100.

⁶¹Swearingen v. Bassett, 65 Tex. 267; Gordon v. McCall, 20 Tex. Civ. App. 283, 48 S. W. 1111.

⁶²McBride v. Moore (Tex. Civ. App.) 37 S. W. 450. See also Luhn v. Stone, 65 Tex. 439; Morgan v. Morgan, 1 Posey Unrep. Cas. (Tex.) 400.

say the least. A permitted occupancy by the owner of the life estate will not give to husband and wife homestead rights where they own no estate or rights whatever until the death of such life tenant.⁶³

§ 253. — Business Homestead.

The Constitution of 1876 was the first to specifically exempt as a part of the homestead the place where the head of the family exercised his calling or business. Prior to that Constitution, the use of a place for such purpose did not constitute it a part of the home.⁶⁴ Here, as in residence homestead, the lot or lots may be separate and wholly detached from the one upon which the family resides.⁶⁵ The business homestead is a part of the one homestead exempted by law, and its combined value with the residence home must not exceed the constitutional limit.⁶⁶ If rural, the 200 acres permitted is supposed to constitute the business homestead as well as the residence, since the calling or business of those who live in the country is usually farming or a kindred avocation, while the avocation of those who live in our towns and cities varies. "Therefore, if the head of a family be a merchant, in addition to his home, his storehouse is exempt; if a banker, his banking house; if a blacksmith, his shop; if a lawyer or doctor, his office; if a farmer, his farm; if a gardener, his garden, etc.,—the only limitation as to quantity, in case of urban property, being one of value."⁶⁷ There can be no such thing as a residence homestead in the city and a rural business homestead;⁶⁸ nor can one having a rural residence homestead claim and hold as a part thereof an urban business homestead.⁶⁹ The property must be actually used as the place

⁶³Hampton v. Gilliland (Tex. Civ. App.) 56 S. W. 572.

⁶⁴Iken v. Olenick, 42 Tex. 195.

⁶⁵Miller v. Menke, 56 Tex. 539.

⁶⁶St. Louis Brewing Asso. v. Walker (Tex. Civ. App.) 54 S. W. 360.

⁶⁷Waggener v. Haskell, 89 Tex.

435, 35 S. W. 1; Atkinson v. Phares, 20 Tex. Civ. App. 150, 49 S. W. 653.

⁶⁸Exall v. Security Mort. & Trust Co. 15 Tex. Civ. App. 643, 39 S. W. 959.

⁶⁹Williams v. Willis, 84 Tex. 398, 19 S. W. 683.

se the calling or business of the head of the family.⁷⁰ matter of law, the actual transacting of business at the not indispensable, where the owner has in good faith ; for such purpose.⁷¹ But mere ownership of property the head of the family might carry on business, but actually used for other purposes, such as renting out like, will, of course, not entitle it to the protection of

rules for determining whether or not a particular use is purposes protected by law are determined much the same dence homesteads ; and, as in those cases, the right will any interest, whether legal or equitable,⁷³ and con- long as the property is used for the purposes prescribed. 's rights are the same in the business as in the residence d. It cannot be mortgaged⁷⁴ or sold without her con- ; the husband may, by an abandonment of his use of it, the property of its exempt character, and then convey her joinder.⁷⁵ In the event of an abandonment of the by the husband the wife would have no right to con- exempt character by an occupation of it herself for purposes, for she is not the head of the family. In case ons her as well, a different conclusion should be reached. the courts will say so or not remains to be seen.

ald v. Campbell, 57 Tex. 410, 35 S. W. 404; Hargadene v. tz v. Woeltz (Tex. Civ. Whitfield, 71 Tex. 482, 9 S. W. 475; S. W. 905; Dickson v. Pfeiffer v. McNatt, 74 Tex. 640, 12 x. Civ. App.) 24 S. W. S. W. 821; Hull v. Naumberg, 1 Tex. t v. Sanger Bros. 13 Tex. Civ. App. 132, 20 S. W. 1125; Hous- 410, 35 S. W. 404; Schnei- ton v. Newsome, 82 Tex. 75, 17 S. ipbell, 1 Tex. Civ. App. W. 603; King v. C. M. Hapgood 5. W. 55; Hargadene v. Shoe Co. 21 Tex. Civ. App. 217, 51 71 Tex. 482, 9 S. W. 475; S. W. 532. Lapowski, 85 Tex. 168, 19
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ay v. White, 70 Tex. 475, 1.
erry v. City Nat. Bank, 85 22 S. W. 151, 299; Foust Bros. 13 Tex. Civ. App.

410, 35 S. W. 404; Hargadene v. Whitfield, 71 Tex. 482, 9 S. W. 475; Pfeiffer v. McNatt, 74 Tex. 640, 12 S. W. 821; Hull v. Naumberg, 1 Tex. Civ. App. 132, 20 S. W. 1125; Houston v. Newsome, 82 Tex. 75, 17 S. W. 603; King v. C. M. Hapgood Shoe Co. 21 Tex. Civ. App. 217, 51 S. W. 532.

⁷²Ante, § 252; Brennan v. Fuller, 14 Tex. Civ. App. 509, 37 S. W. 641.

⁷⁴Woeltz v. Woeltz (Tex. Civ. App.) 57 S. W. 905.

⁷⁵Willis v. Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715.

§ 254. — Things Affixed to the Realty.

Whether residence or business homestead the exemption applies, not only to the buildings proper, but to such other things as under the law of real property may be attached to and become a part of the realty. Thus, a lathe,⁷⁶ manufacturing machinery,⁷⁷ a sugar mill erected by the owner,^{77'} a grist mill and machinery,⁷⁸ and gin machinery⁷⁹ have been held, when placed upon the realty with the intention that they should become a part thereof, to be protected.⁸⁰ In such cases the husband has no authority to sell or mortgage, as it is homestead.⁸¹ But a homestead right cannot be predicated on machinery not affixed to land in which its owner has any interest, legal or equitable, for in such cases there is no home for it to form a part of.⁸²

The crops standing upon the ground, and unsevered therefrom, are exempt from levy. If not a part of the realty, being so situated thereon that they cannot be severed and gathered without an infringement upon the homestead rights, they are protected until actually severed.⁸³

§ 255. — Issues, Rents, and Damages.

A voluntary renting out of the homestead or a part thereof does not necessarily subject the portion so rented to seizure for the owner's debts, but it does make liable the rents. The homestead is exempted because it is used by the family,—not rented. There is no reason for holding the rents to be a part of it, and therefore exempt.⁸⁴ The crops grown upon it, when gathered,

⁷⁶House v. Phelan, 83 Tex. 595, 19 S. W. 140.

⁷⁷Willis v. Morris, 66 Tex. 628, 1 S. W. 799.

^{77'}Hutchins v. Masterson, 46 Tex. 551.

⁷⁸Willis v. Moore, 59 Tex. 628; Maroney Hardware Co. v. Connellee (Tex. Civ. App.) 25 S. W. 448.

⁷⁹Gentry v. Bowser, 2 Tex. Civ. App. 388, 21 S. W. 569.

⁸⁰See also Houston & G. N. R. Co. v. Winter, 44 Tex. 597; Harkey v.

Cain, 69 Tex. 146, 6 S. W. 637.

⁸¹Phelan v. Boyd (Tex.) 14 S. W. 290.

⁸²Taylor v. Prendergast (Tex. Civ. App.) 29 S. W. 87.

⁸³Alexander v. Holt, 59 Tex. 205; Coates v. Caldwell, 71 Tex. 19, 8 S. W. 922; Phillips v. Warner, 4 Tex. App. Civ. Cas. (Willson) § 147, 16 S. W. 423; Silberberg v. Trilling, 82 Tex. 523, 18 S. W. 591.

⁸⁴Hinz v. Moody, 13 Tex. Civ. App. 193, 35 S. W. 832.

re not exempt, nor are any other issues, products, or profits.⁸⁵ However, a different question arises should the rents or profits accrue otherwise than by the voluntary act of the owners; for if one seize the homestead unlawfully, he cannot, by retaining possession of it, deprive the owners of its rents and uses. These are but incidental to a recovery of the homestead, and are the damages occasioned by the wrongful act of the party seizing, and in no sense the result of the voluntary act of the owners.⁸⁶ Upon the same principle, damages recovered for an injury to the homestead ought to be protected.⁸⁷

256. The Right to Select.

The right to select the homestead is a matter that at times may become of much importance in determining the exempt character of property. That is, whether the husband or the wife is the preference in the matter, and if either, then which one. But one home for the family is protected, and, in case of disagreement between husband and wife as to which of different properties constitutes their homestead, the world should not be left without a means of knowing which is, and which is not, exempt. The husband, being the head of the family, and being charged with the duty of supporting it, and being liable for all its expenses, is pre-eminently the proper person to choose the home.⁸⁸ The domicil of the wife follows—is drawn to—that of her husband. When he dedicates a place as his home, *eo instanti* it becomes the home of the wife and family also.⁸⁹ This right, however, is not to be used as an instrument of fraud, but must be fairly exercised toward the wife. If he acts in good faith he is not responsible for mistakes of judgment, or for the effects which follow his decisions. It may result in subjecting to liability the family homestead, possibly before another is acquired, yet it

⁸⁵F. F. Collins Mfg. Co. v. Carr, 11 Tex. Civ. App. 364, 32 S. W. 366.

⁸⁶National Bank v. Kilgore, 17 Tex. Civ. App. 462, 43 S. W. 565; ⁸⁷Master v. Dickson, 17 Tex. Civ. App. 473, 43 S. W. 911.

⁸⁸Lee v. Welborne, 71 Tex. 500, 9 S. W. 471; Gentry v. Bowser, 2 Tex.

Civ. App. 388, 21 S. W. 569.

⁸⁹Mitchell v. Nix, 1 Posey Unrep. Cas. (Tex.) 126.

⁹⁰Holliman v. Smith, 39 Tex. 357; Slavin v. Wheeler, 61 Tex. 654; Jordan v. Godman, 19 Tex. 273; Marler v. Handy, 88 Tex. 421, 31 S. W. 636.

cannot be said that the husband is powerless to abandon the homestead without the wife's consent. There is no distinction in this respect between the residence and business homesteads.⁹⁰ It has been said that when husband and wife are in accord evidence of the wife's intention as to homestead is admissible as tending to show the intention of the husband.⁹¹

§ 257. Designating Homestead; Statute.

When the homestead of a family, not being in a town or city, is a part of a larger tract or tracts of land than is exempt from forced sale as such homestead, the head of the family may designate and set apart the homestead, not exceeding 200 acres, to which the family is entitled.⁹² The succeeding articles provide the form for an instrument of writing for such designation, and stipulate for its registration by the clerk in the record of deeds for the county where such homestead may be situated. Provision is also made for an involuntary designation when there is an excess liable for execution against the owner. The evident purpose of the statute is to facilitate the seizure and sale of such excess as there may be above the constitutional limitation. The designation, when made by the head of the family as provided by the statute, is binding upon him and all others in privity with him, and operates as a relinquishment of the homestead claims to all that portion not included in such designation.⁹³ The head of the family may also, subsequent to such designation, change the boundaries of such homestead in like manner as the original designation is made, but such change will not injuriously affect those whose rights may have intervened after such original designation.⁹⁴ But he cannot by such means renounce a part of his actual homestead and claim a tract wholly disconnected therefrom, and not used for homestead purposes, in such manner as to make a valid mortgage upon the part so sought to be re-

⁹⁰Parrish v. Frey, 18 Tex. Civ. App. 271, 44 S. W. 322.

⁹¹Gunn v. Wynne (Tex. Civ. App.) 43 S. W. 290. See also Craddock v. Edwards, 81 Tex. 609, 17 S. W. 228. See *ante*, § 28; *post*, § 270.

⁹²Rev. Stat. art. 2403.

⁹³Ibid. art. 2415.

⁹⁴Ibid. art. 2425.

⁹⁵ The statute does not require that the limit of 200 be exhausted in such designation, any more than it is that the homestead in all cases shall contain that but a setting apart of less, if free from evil motive, is binding upon the wife, where innocent persons' rights are involved, and possibly in all cases. Instances may arise where the wife may make the designation contemplated by statute in the absence of the husband, as where he has deserted her, or is otherwise unable to make it. It will be observed that the right head of the family, not the husband, and in law the wife becomes the head of the family, when by reason of the circumstances she is such in fact. A failure to make the designation does not impair the scope or force of the lawful exemption; it does it strengthen it, further than furnish clear evidence of the intention of the owners.

The statute has no application whatever to homestead situated within a town or city, and an attempted designation under the statute will not preclude the assertion of homestead in other property which is and was the true homestead of the owner.⁹⁶

Rule, Generally.

"shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law,"—are the only words to be found in our statutes in any manner interfering with the free alienation of the homestead. But this provision is ample protection to the wife. "in the manner prescribed by law," by which married women are required to give their consent to a conveyance of the homestead, has been given.⁹⁷ The conveyance must always be by the instrument of the husband and wife, for if it is in the husband's separate property or the community, she must join by the constitutional provision quoted, and if in her separate property, then for reasons already stated.⁹⁸ Any other con-

v. Wangermann, 93 Tex. W. 312.

⁹⁷ *Ante*, § 117.

⁹⁸ *Ante*, § 98.

v. Decker, 72 Tex. 578, 10

veyance is void, and may be repudiated at will,⁹⁹ even though the sale was procured mainly through her instrumentality, and she declared that she wished to sell, requested the purchaser to buy, and actually received the purchase money.¹⁰⁰ It may be sold by an agent having a power of attorney.¹

§ 259. Sale by Husband; Adjusting Equities.

The husband, if the owner, is forbidden to sell the homestead without the consent of the wife given in the proper manner; yet his conveyance, unlike a mortgage, is not declared void, and may in a proper case operate as an estoppel against his allegations of claim to the property. It has no force whatever as to the wife so long as she has any homestead rights whatever in the property, but upon the acquisition of a new homestead her rights in the old one cease entirely, and she cannot recover it because she has no interest in it; nor can the husband recover it because of his deed.² But it must not be understood from this that the deed of the husband is valid for any purpose whatever so long as the wife or husband either has a homestead right in the property,—that is, has not abandoned it and acquired another; for whatever is forbidden by law is as clearly invalid as though it were declared void, and to permit the husband to bind even himself by his deed of the homestead would be a material interference with the wife's rights therein. Such a deed is inoperative for any purpose, and may be canceled at the instance of either husband or wife, so long as they have not by an abandonment brought themselves within the rule first stated above.³ If the wife, by her insanity, is incapable of joining in the conveyance, the husband may alone convey, for it is not consistent with reason to say the law will require an impossibility of anyone. If

⁹⁹Stallings v. Hulum, 89 Tex. 431, 35 S. W. 2; Myers v. Evans, 81 Tex. 317, 16 S. W. 1060.

¹⁰⁰Huss v. Wells, 17 Tex. Civ. App. 195, 44 S. W. 33. See *ante*, § 131, and chap. VI.

¹*Ante*, § 120.

²Marler v. Handy, 88 Tex. 422, 31 S. W. 636; Shields v. Aultman, 20

Tex. Civ. App. 345, 50 S. W. 219; De Bajligethy v. Johnson (Tex. Civ. App.) 56 S. W. 95. Compare Gibbs v. Mays, 2 Posey Unrep. Cas. (Tex.) 215.

³Stallings v. Hulum, 89 Tex. 431, 35 S. W. 2; Rogers v. Renshaw, 37 Tex. 625.

the wife cannot, by reason of her insanity, join in the deed, the statute has no application. The statute authorizing the appointment of a guardian in such cases will not affect the matter. The law contemplates a voluntary and personal assent to the conveyance by the wife, and under such circumstances this cannot be had.⁴

But it is only while there exist homestead rights in property that the husband is forbidden to convey it. After its abandonment its conveyance is determined in the same manner as other property belonging to its owner. The wife's right is not property, but is a right in property, and holds in abeyance the right of the owner, if the husband, to convey during the existence of such right in her. The husband may sell freely before the homestead rights attach, and since the homestead rights are inferior to the claim for purchase money and other valid liens existing at the time of the destination of property as homestead, the husband may separately convey for the purpose of adjusting or discharging such liens. The dedication of property as homestead does not invalidate prior existing valid liens and encumbrances, but only prevents others being made. This would be taking one person's property and giving it to another,—a thing the law has never sanctioned. If the wife cannot assert successfully her homestead rights against a prayer for sale of the property to satisfy prior liens, then no harm can come to her from permitting the husband to make disposition of it for the purpose of adjusting such equities. As against such rights and equities the homestead right does not attach; so long as they are valid they have precedence of her rights of homestead, and hence the husband may adjust them by renewal lien,⁵ mortgage, sale in part, or even by a complete renunciation of the property so burdened.⁶ But this power exists

⁴*Shields v. Aultman*, 20 Tex. Civ. App. 345, 50 S. W. 219.

⁵*Lennox v. Sanders* (Tex. Civ. App.) 54 S. W. 1076.

⁶*White v. Shepperd*, 16 Tex. 163; *Clements v. Lacy*, 51 Tex. 150; *Gillum v. Collier*, 53 Tex. 592; *DeBruhl v. Maas*, 54 Tex. 464; *Wheatley v.*

Griffin, 60 Tex. 209; *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170, 20 S. W. 997; *Dickson v. Allen* (Tex. Civ. App.) 24 S. W. 661; *Archenhold v. B. C. Evans Co.* 11 Tex. Civ. App. 138, 32 S. W. 795; *Investors' Mortg. Secur. Co. v. Loyd*, 11 Tex. Civ. App. 449, 33 S. W. 750; *Baker*

only so long as the encumbrance exists; when that is no longer valid, the wife's rights attach,⁷ and the power is gone. The power of the husband must, of course, be exercised fairly toward the wife.⁸ He must not practise a fraud upon her under the guise of doing equity to others. She is at liberty to show that his conveyance for the ostensible purposes above enumerated was really for other purposes, and hence (if such be the case) a fraud of her rights.⁹ It is difficult, too, to see how the rights of innocent persons may be protected as against the wife, if, in the expression in this connection is allowable. For unless the wife be guilty of some character of fraud, she will not lose her homestead by the act of her husband, even if he does deceive the purchaser. What the husband cannot do by deed he cannot do by contract or conduct amounting to estoppel.¹⁰ An agreement by the husband to arbitrate the question of boundary of the homestead is not binding upon the wife where she is not a party to the agreement;¹¹ but if she were a party it might be.¹²

The husband may alone convey a part of the tract on which is situated the homestead, if the portion conveyed forms no part of the land actually used for a home, and thus leaves the constitutional amount to the family.¹³ So, the husband may lease the homestead without the wife's consent at least for a reasonable time.¹⁴

It is not every encumbrance against the homestead that will authorize the husband alone to convey, even where the purchaser assumes the indebtedness.^{14'} The principle is that there

v. Collins, 4 Tex. Civ. App. 520, 23 S. W. 493; *Clitus v. Langford* (Tex. Civ. App.) 24 S. W. 325; *Roy v. Clarke*, 75 Tex. 28, 12 S. W. 845; *Watkins v. Sproull*, 8 Tex. Civ. App. 427, 28 S. W. 356; *Cadwallader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 666, 917.

⁷*James v. Daniels* (Tex. Civ. App.) 43 S. W. 26.

⁸*Arnold v. Macdonald*, 22 Tex. Civ. App. 487, 55 S. W. 529.

⁹*Sherring v. Augustus*, 11 Tex. Civ. App. 194, 32 S. W. 450; *Cad-*

wallader v. Campbell (Tex. Civ. App.) 31 S. W. 829; *Morris v. Secke*, 60 Tex. 633.

¹⁰*See Gober v. Smith* (Tex. Civ. App.) 36 S. W. 910.

¹¹*Oldham v. Medearis* (Tex. Civ. App.) 40 S. W. 350.

¹²*Ante*, § 65.

¹³*Neiman v. Schuster* (Tex. Civ. App.) 43 S. W. 1075.

¹⁴*Engelhardt v. Batla* (Tex. Civ. App.) 31 S. W. 324.

^{14'}*Gibbons v. Hall* (Tex. Civ. App.) 59 S. W. 814.

exist a reasonable necessity for the sale, by reason of the encumbrance; in other words, the sale must have been made for the purpose of discharging a lien or adjusting an equity.

§ 260. — for Roads, Streets, etc.

A right of way is not a title, it is an easement; and the inhibition being against the sale by the husband it is not thought that a conveyance of a right of way by the husband to a railway company will come within the statute. Be that, however, as it may, if the easement across the land does not materially interfere with the use and enjoyment of the homestead, the husband may grant it without the concurrence of the wife.¹⁵ Subject to the same limitation,—that is, that it does not materially interfere with the use and enjoyment of the property for homestead purposes,—the husband may, without the consent of the wife, dedicate a portion of the property to a city for streets and alleys.¹⁶

§ 261. Contracts of Wife to Sell.

For reasons too obvious to mention, the wife's parol agreement to sell the homestead at a future day cannot be enforced against her. Nor are her written agreements upon any better footing.¹⁷ Her bond for title, though signed and acknowledged under the solemnities of the statute, is nevertheless, under our decisions, ineffectual to bind her to make a conveyance. She may, when called upon to sign the instrument of conveyance, refuse to do so, since she has until the very last moment within which to declare that she wishes to retract it. In such case it is said that her acknowledgment of the bond is no more than an evidence that she is then willing to sell the homestead at a future day. She is consenting to a contract to sell, not to an actual sale. Such are the reasons assigned by the courts for refusing to en-

¹⁵Mills, Em. Dom. 71; Chicago & S. W. R. Co. v. Swinney, 38 Iowa, 182; Randall v. Texas C. R. Co. 63 Tex. 586; Chicago, T. & M. C. R. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472.

¹⁶Orrick v. Fort Worth (Tex. Civ. App.) 32 S. W. 443; Klenk v. Knoble, 37 Ark. 298; Little Rock v. Wright, 58 Ark. 142, 23 S. W. 876.

¹⁷Cross v. Everts, 28 Tex. 523.

force such agreements.¹⁸ Her plea of homestead, however, would avail her nothing after the premises ceased to be homestead. Her contract could then be specifically enforced against her.¹⁹ To summarize and question: The law prescribes the same method for conveying her separate property and her homestead. No greater solemnity is required in the one case than in the other. Her title bond for the conveyance of her separate property (not homestead) will be enforced; her similar bond to convey the homestead is unenforceable. Her right to retract is exhausted by the bond in the case first stated, and remains, notwithstanding the bond, in the second,—a judicial anomaly, to be sure, yet such is the holding of our supreme court.²⁰

§ 262. Cannot be Mortgaged.

The constitutional provision quoted at the beginning of this chapter declares that “no mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor or improvements made thereon as hereinbefore provided, whether such mortgage, or trust deed, or other lien shall have been created by the husband alone or together with his wife; and all pretended sales of the homestead, involving any condition of defeasance, shall be void.” Our Constitutions have not always been so stringent. Under the Constitution of 1845 the right of the husband and wife to encumber was not restricted.²¹ The encumbrance, however, which could be effective only through the instrumentality of a forced sale, while not void or even voidable, was, by reason of the inhibition against forced sales, inoperative,²² so long as the property was used for homestead purposes. But when such use had ceased the mortgage might be foreclosed.²³ If the lien could be foreclosed without a forced sale, as by power of sale in a mortgage or deed of trust, it was both valid and effective.²⁴ The Constitution of 1869 in

¹⁸Jones v. Goff, 63 Tex. 248; *ante*, § 122.

¹⁹Brewer v. Wall, 23 Tex. 589; Cross v. Everts, 28 Tex. 523; Goff v. Jones, 70 Tex. 572, 8 S. W. 525.

²⁰*Ante*, §§ 120, 122.

²¹*Ante*, § 243.

²²Sampson v. Williamson, 6 Tex. 102.

²³Lee v. Kingsbury, 13 Tex. 68; Stewart v. Mackey, 16 Tex. 56.

²⁴Bomback v. Sykes, 24 Tex. 217.

pects was not different from that of 1845.²⁵ A mortgaging a species of conveyance, and not being specifically en, the only requirement was that the same should be d in the manner prescribed for other conveyances. And he homestead belonged to the husband or to the commu-mortgage executed by him alone was inoperative only ie exemption continued.²⁶ To further protect the home-om the encroachment of creditors under the line of deci-ferred to, the constitutional convention of 1875 incorpo-ie prohibitory clause which still remains. It is declared mortgage, trust deed, or other lien on the homestead shall valid. "What cannot 'ever be valid,' is never valid, and never valid is always void."²⁷ The inhibition does not ap-e head of a family if he has no wife.²⁸ If the property is ime of the execution of the mortgage, homestead, by hav-n dedicated for such purpose, no lien can attach,²⁹ and band's attempted renunciation of such property will not lien.³⁰ If the property be actually homestead at the , valid lien can be created against it save for the purposes d by law, and this immunity from the force of such at- l liens does not cease when the property is no longer ad, but the instrument will never become valid.³¹ The the same with respect to business as to residence home-² Even if the parties have in their mind the intention, making preparations to abandon the homestead, it can-nortgaged until it has been actually abandoned.³³ The l is as powerless to mortgage it to his wife as he is to any

n v. Peak, 38 Tex. 426.

rt v. Mackey, 16 Tex. 56.

v. Cain, 65 Tex. 75.

v. Rollins, 74 Tex. 566, 12

; Smith v. Von Hutton, 75

13 S. W. 18; Watts v.

Tex. 13, 13 S. W. 16; Bate-

ool, 84 Tex. 405, 19 S. W.

lbassa v. Raley, 1 Tex. Civ.

, 23 S. W. 253; Davis v.

(Tex. Civ. App.) 46 S. W.

ker v. Patton (Tex. Civ.

S. W. 64.

²⁵Rose v. Blankenship (Tex.) 18

S. W. 101; Jacobs v. Hawkins, 63

Tex. 1; Miles v. Kelley, 16 Tex. Civ.

App. 147, 40 S. W. 599.

²⁶Kempner v. Comer, 73 Tex. 196,

11 S. W. 194.

²⁷Inge v. Cain, 65 Tex. 75; Odum

v. Menafee, 11 Tex. Civ. App. 119, 33

S. W. 129.

²⁸Woeltz v. Woeltz (Tex. Civ.

App.) 57 S. W. 905.

²⁹Caywood v. Henderson (Tex. Civ.

App.) 44 S. W. 927; Lumpkin v.

other person,³⁴ since it is not a question of whether she actually injured by the mortgage, but such instruments are actively and absolutely prohibited except for certain named purposes. But where the homestead is a part of a larger tract excess above the actual homestead may be mortgaged, or the entire tract mortgaged; in which case the mortgage would be subject to the right of the parties to designate their homestead and the mortgage would be valid as to the excess.³⁵ The husband and wife would have no authority to designate their homestead omitting therefrom land actually used by them for homestead purposes, and mortgage that which is so used, even though the land designated be the full amount allowed them by law. It is not their declarations that constitute land homestead, but the use to which it is put.

Further, it can make no difference what form the mortgage assumes, for the law will look at the substance of the action. It may be by the ordinary mortgage, deed of trust, or by a deed absolute in form with agreement to reconvey upon payment of a stipulated amount,³⁷ or by a simulated conveyance retaining liens against the property,³⁸ or by deed absolute in form,³⁹ or by a conveyance to another to enable the latter to mortgage.⁴⁰

We have seen that the husband may, in the adjustment of liens against the homestead, mortgage it.⁴¹ It would probably be a superfluity to add that the mortgage in such case could

Nicholson, 10 Tex. Civ. App. 108, 30 S. W. 568; Tackaberry v. City Nat. Bank, 85 Tex. 488, 22 S. W. 151, 299. Compare Sanger Bros. v. Hicks Co., 22 Tex. Civ. App. 473, 56 S. W. 775, where the facts show an abandonment of a business homestead at the time of executing a mortgage on it.

³⁴Madden v. Madden, 79 Tex. 595, 15 S. W. 480.

³⁵Henkel v. Bohnke, 7 Tex. Civ. App. 16, 26 S. W. 645.

³⁶Cervenka v. Dyches (Tex. Civ. App.) 32 S. W. 316.

³⁷Kainer v. Blank, 6 Tex. Civ. App. 1, 24 S. W. 851.

³⁸Marx v. Baker, 10 Tex. Civ. App. 148, 29 S. W. 908.

³⁹Brown v. Wilson (Tex. Civ. App.) 29 S. W. 530; O'Shaughnessy v. Moore, 73 Tex. 108, 11 S. W. 211; S. C. 76 Tex. 606, 13 S. W. 211; Light v. Brown (Tex. Civ. App.) 29 S. W. 886; Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 409, 29 S. W. 399.

⁴⁰People's Bldg. Loan, & Sav. Ass'n v. Dailey, 17 Tex. Civ. App. 1, 24 S. W. 364.

⁴¹*Ante*, § 259.

be for the amount that is properly a charge against the homestead. For any excess above that amount, any pretended mortgage or lien of whatsoever character, would be void. But the debt would have to be a valid, enforceable charge against the homestead before the husband would have any right to in any way further encumber the homestead by a renewal, mortgage, or otherwise.⁴²

Ordinarily the inhibition applies to mortgages executed upon such personal property as by being affixed to the realty becomes a part of the homestead; but the facts may be such between all the parties that a valid mortgage may be given upon it; this is upon the principle of prior equities or liens.⁴³

It may be, however, that the husband and wife by their fraudulent representations or conduct may estop themselves to assert the invalidity of a mortgage upon their homestead.⁴⁴ But if the mortgagee has notice of the vice of the transaction, either in person or through an agent representing him in the transaction,⁴⁵ he cannot successfully plead an estoppel, for he is not deceived.⁴⁶ But the wife is not estopped by the representations, acts, or conduct of her husband in which she does not participate.⁴⁷

§ 263. Mechanics' Liens.

It is essential to the validity of the statutory mechanic's lien for improvements upon the homestead, that the directions of the Constitution and statutes be complied with,—at least sub-

⁴²*Starnes v. Beitel*, 20 Tex. Civ. App. 524, 50 S. W. 202.

⁴³*McNeil v. Moore*, 7 Tex. Civ. App. 536, 27 S. W. 163.

⁴⁴*See ante*, §§ 128, 129; *Scripture v. Scottish-American Mortg. Co.* 20 Tex. Civ. App. 153, 49 S. W. 644; *Forbes v. Thomas* (Tex. Civ. App.) 51 S. W. 1097.

⁴⁵*People's Bldg. Loan, & Sav. Asso. v. Dailey*, 17 Tex. Civ. App. 38, 42 S. W. 364.

⁴⁶*Forbes v. Thomas* (Tex. Civ.

App.) 51 S. W. 1097; *Light v. Brown* (Tex. Civ. App.) 26 S. W. 886; *Texas Loan Agency v. Hunter*, 13 Tex. Civ. App. 402, 35 S. W. 399; *Brown v. Wilson* (Tex. Civ. App.) 29 S. W. 530; *Interstate Bldg. & L. Asso. v. Barker*, 16 Tex. Civ. App. 676, 39 S. W. 317.

⁴⁷*Kallman v. Ludenecker*, 9 Tex. Civ. App. 182, 28 S. W. 579; *Seay v. Fennell*, 15 Tex. Civ. App. 261, 39 S. W. 181.

stantially.⁴⁸ Article 3304 of the Revised Statutes provides: "When material is furnished, labor performed, erections or repairs made upon a homestead, if the owner thereof is a married man, then to fix and secure the lien upon the same it shall be necessary for the person or persons who furnished the material or performed the labor, before such material is furnished or labor is performed, to make and enter into a contract in writing, setting forth the terms thereof, which shall be signed by the owner and his wife, and privily acknowledged by her, as is required in making sales of homestead. And such contract shall be recorded in the office of the county clerk in the county where such homestead is situated, in a well-bound book to be kept for that purpose provided, when such contract has been made and entered into by the husband and wife and the contractor or builder, and the same has been recorded, as heretofore provided, then the same shall inure to the benefit of any and all persons who shall furnish material or labor thereon for such contractor or builder." The requirements of the article are cumulative of the others in preceding and succeeding articles of the same chapter, and are not to be understood as furnishing a complete method of fixing a lien upon the homestead. The article must be construed in connection with whatever else has been said upon the same subject. The improvements meant, while not specifically defined, in the particular article under consideration, must be held to include those things mentioned in article 3294; and the time within which such contract with the husband and wife must be filed is placed at four months and thirty days respectively, according as the amount is in favor of an original contractor or other person, by the terms of article 3295. And again, in article 3299 it is required that a description of the house, building, or improvement, and the lot or tract of land, shall accompany the contract. An omission of any of the requirements of the act will be fatal to the lien.⁴⁹ When once dedicated, whether actually occupied or not, the rights of homestead have attached, as we have before seen, and the contract, to be good, must follow

⁴⁸See *Banks v. House* (Tex. Civ. App.) 50 S. W. 1022; *Bosley v. Pease* (Tex. Civ. App.) 22 S. W. 516, S. C. 86 Tex. 292, 24 S. W. 279.
⁴⁹*Cameron v. Marshall*, 65 Tex. 7.

the statute. It must be in writing,⁵⁰ signed and privily acknowledged by the wife, signed and acknowledged by the husband,⁵¹ and precede the furnishing of the material, or the performing of the labor, for which the lien is sought.⁵² Formerly it seems that one loaning money to pay for materials and labor used in making improvements had no lien,⁵³ but under our present statute it is said that "it is not required that the person with whom the contract is made for such work and material shall be the very person who does the work or who owns the material,⁵⁴ but that if he pays for the same from time to time as performed or furnished he is entitled to the lien,⁵⁵ and this, too, whether he pays directly to the persons laboring or furnishing material, or to the husband for such purpose.⁵⁶ And it is further said that it is immaterial whether the husband pays for these things out of the money so loaned, or out of other funds, and reimburses the same from such advance.⁵⁷ But it must not be thought that the statute authorizes the husband and wife to thus mortgage the homestead for borrowed money, even though such money be borrowed for the purpose of making improvements thereon. The owners cannot borrow money upon the homestead for any purpose, as the word "borrow" is commonly understood. They may make a contract for money for improvements, and if the money goes to pay for such improvements, even though it passes through the husband's hands as just seen, the lien may exist. But if the contract be to borrow money, and not for improvements, even though the money be placed in such improvements, no lien exists.⁵⁸

⁵⁰Cameron v. Gebhard, 85 Tex. 610, 92 S. W. 1033.

⁵¹Kalamazoo Nat. Bank v. Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350.

⁵²Lyon v. Ozee, 66 Tex. 95, 17 S. W. 405; Walker v. House (Tex. Civ. App.) 24 S. W. 82; Heady v. Bexar Bldg. & L. Asso. (Tex. Civ. App.) 26 S. W. 468.

⁵³Gaylord v. Loughridge, 50 Tex. 573.

⁵⁴Walters v. Texas Bldg. & L. Asso. (Tex. Civ. App.) 29 S. W. 51.

⁵⁵Pioneer Sav. & L. Asso. v. Edwards, 12 Tex. Civ. App. 556, 34 S. W. 193; Luzenberg v. Bexar Bldg. & L. Asso. 9 Tex. Civ. App. 261, 29 S. W. 237.

⁵⁶First Nat. Bank v. Campbell (Tex. Civ. App.) 46 S. W. 845.

⁵⁷Pioneer Bldg. & L. Asso. v. Everheart, 18 Tex. Civ. App. 192, 44 S. W. 885.

⁵⁸International Bldg. & L. Asso. v. Fortassain (Tex. Civ. App.) 23 S. W. 496.

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⁴⁸See *Banks v. House* (Tex. Civ. App.) 50 S. W. 1022; *Bosley v. Pease* (Tex. Civ. App.) 22 S. W. 516, S. C. 80 Tex. 292, 24 S. W. 279.
⁴⁹*Cameron v. Marshall*, 65 Tex. 7.

the statute. It must be in writing,⁵⁰ signed and privily acknowledged by the wife, signed and acknowledged by the husband,⁵¹ and precede the furnishing of the material, or the performing of the labor, for which the lien is sought.⁵² Formerly it seems that one loaning money to pay for materials and labor used in making improvements had no lien,⁵³ but under our present statute it is said that "it is not required that the person with whom the contract is made for such work and material shall be the very person who does the work or who owns the material,"⁵⁴ but that if he pays for the same from time to time as performed or furnished he is entitled to the lien,⁵⁵ and this, too, whether he pays directly to the persons laboring or furnishing material, or to the husband for such purpose.⁵⁶ And it is further said that it is immaterial whether the husband pays for these things out of the money so loaned, or out of other funds, and reimburses the same from such advance.⁵⁷ But it must not be thought that the statute authorizes the husband and wife to thus mortgage the homestead for borrowed money, even though such money be borrowed for the purpose of making improvements thereon. The owners cannot borrow money upon the homestead for any purpose, as the word "borrow" is commonly understood. They may make a contract for money for improvements, and if the money goes to pay for such improvements, even though it passes through the husband's hands as just seen, the lien may exist. But if the contract be to borrow money, and not for improvements, even though the money be placed in such improvements, no lien exists.⁵⁸

⁵⁰Cameron v. Gebhard, 85 Tex. 610, 22 S. W. 1033.

⁵¹Kalamazoo Nat. Bank v. Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350.

⁵²Lyon v. Ozee, 66 Tex. 95, 17 S. W. 405; Walker v. House (Tex. Civ. App.) 24 S. W. 82; Heady v. Bexar Bldg. & L. Asso. (Tex. Civ. App.) 26 S. W. 468.

⁵³Gaylord v. Loughridge, 50 Tex. 573.

⁵⁴Walters v. Texas Bldg. & L. Asso. (Tex. Civ. App.) 29 S. W. 51.

⁵⁵Pioneer Sav. & L. Asso. v. Edwards, 12 Tex. Civ. App. 556, 34 S. W. 193; Luzenberg v. Bexar Bldg. & L. Asso. 9 Tex. Civ. App. 261, 29 S. W. 237.

⁵⁶First Nat. Bank v. Campbell (Tex. Civ. App.) 46 S. W. 845.

⁵⁷Pioneer Bldg. & L. Asso. v. Everheart, 18 Tex. Civ. App. 192, 44 S. W. 885.

⁵⁸International Bldg. & L. Asso. v. Fortassain (Tex. Civ. App.) 23 S. W. 496.

§ 264. Other Liens for Improvements.

What has been said in the foregoing section has reference to the statutory mechanic's or materialman's lien as it is commonly called. Aside from this statutory lien, which is not wholly a contract lien, but one which arises by virtue of the statute when its terms have been met, the constitutional exemption of the homestead does not protect it against sale for debts for work and material used in constructing improvements thereon, when such work and materials are contracted for in writing, with the consent of the wife given in the manner required by law in making sale and conveyance of the homestead. The mechanic's lien act is not one in pursuance of the clause of the Constitution defining the contract lien for improvements here referred to, but is an act providing the manner of enforcement of the mechanic's lien provision of the Constitution. It has reference to the liens commonly known as mechanic's and materialmen's liens, and not to the simple contract lien for improvements which the Constitution permits in the article exempting the homestead. It may well provide for the enforcement of such lien where it does not in any way contravene the Constitution. It has for its object the protection of the class of individuals mentioned in its provisions; but it does not declare that no other form of lien for work and materials furnished for the homestead shall be valid. And the constitutional provision already referred to does declare that the homestead shall not be exempt from forced sale for such debts when contracted in a certain way. So, an instrument in writing, made and entered into by the husband, with his wife's consent evidenced by her signing and acknowledging in the manner for conveyances of the homestead, contracting for work and materials to be used in the construction of improvements upon the homestead, acknowledging a lien upon the same, not being in contravention of any law, is certainly a valid lien, enforceable against the homestead. This contract lien is in the same category of other enforceable liens against the homestead, such as those for taxes, unpaid purchase money, etc.⁵⁹ It is not

⁵⁹Lippencott v. York, 86 Tex. 276, 24 S. W. 275; Lignoski v. Crooker, 86 Tex. 324, 24 S. W. 278, 788; Walters v. Texas Bldg. & L. Asso. (Tex. Civ. App.) 29 S. W. 51; Pioneer Sav. & L. Co. v. Paschall, 12 Tex.

dependent upon, nor controlled by, the provisions of the mechanic's lien law. It may be enforced at any time as other valid liens, and need not, as between the parties, be recorded at all.⁶⁰ Since it must be a contract for the improvements, the lien must precede the improvements;⁶¹ and be signed and acknowledged as a conveyance of the homestead.⁶² The lien here mentioned cannot be executed as a security for money advanced to pay for work or materials used for improvements upon the homestead; the Constitution has not permitted the homestead to be mortgaged for money borrowed for any purpose.⁶³ The contract and lien can only embrace the cost of the labor and materials used in such improvements. Anything additional to this, as attorney's fees and the like, is not permitted by the Constitution,⁶⁴ except where the holder of the lien is forced to establish its validity through the courts, when attorney's fees are recoverable.⁶⁵ Of course, where the property is not homestead at the time of the execution of the mortgage, deed of trust, or other lien, the provisions of law relative to liens upon homestead have no application, no matter if the property does subsequently become homestead.⁶⁶

It may be well to notice a further feature of this lien. A recovery with foreclosure of lien upon the homestead is permitted only in those cases where the plaintiff is entitled to a recovery upon the contract itself. If he has, through his own fault, failed to substantially comply with his contract, but having partially complied and the owners accepted his work, under the laws of contract, he cannot recover upon his contract, but must re-

Civ. App. 613. 34 S. W. 1001; West End Town Co. v. Grigg (Tex. Civ. App.) 54 S. W. 904.

⁶⁰Lignoski v. Crooker, 86 Tex. 324, 24 S. W. 278, 788.

⁶¹Pioneer Sav. & L. Co. v. Dougherty (Tex. Civ. App.) 35 S. W. 698; Miles v. Kelley, 16 Tex. Civ. App. 147, 40 S. W. 599.

⁶²Sutherland v. Williams (Tex.) 11 S. W. 1067; Gilbough v. Stahl Bldg. Co. 16 Tex. Civ. App. 448, 41 S. W. 535.

⁶³Ellerman v. Wurz (Tex.) 14 S.

W. 333; Lone Star Brewing Co. v. Felder (Tex. Civ. App.) 31 S. W. 524; Building & L. Asso. v. Logan (Tex. Civ. App.) 33 S. W. 1088; Campbell v. McCampbell (Tex. Civ. App.) 34 S. W. 970.

⁶⁴Walters v. Texas Bldg. & L. Asso. (Tex. Civ. App.) 29 S. W. 51.

⁶⁵Building & L. Asso. v. Griffin, 90 Tex. 486, 39 S. W. 656; Sproull v. McFarland (Tex. Civ. App.) 56 S. W. 693.

⁶⁶Heatherly v. Little (Tex. Civ. App.) 40 S. W. 445.

cover, if at all, upon a *quantum meruit*; not by force of the contract, but independent thereof. In this case there is no basis for a lien against the homestead, which can only exist by force of a valid enforceable contract.⁶⁷ And the wife's accepting the improvements will not estop her from pleading the failure of performance.⁶⁸

§ 265. Purchase Money.

No homestead rights can attach as against the holder of a lien for the unpaid purchase money of land. So long as it remains unpaid we have seen that the husband might sell or encumber for the purpose of adjusting such charge. It would be manifestly wrong to deny the husband and wife the right to mortgage the homestead for the purpose of raising money with which to discharge such a lien. The constitutional prohibition of a forced sale of the homestead was designed to protect it, not to compel its sacrifice, and a sacrifice would frequently result if they were not permitted to utilize the homestead as a security by means of which to raise money with which to pay off the old encumbrance.⁶⁹ So, too, the husband may, alone, renew a purchase money note to prevent the bar of the statute of limitations, if no fraud is intended upon the rights of the wife; or, under similar circumstances, even renew where the debt is already barred.⁷⁰ Even without the formalities of a mortgage, equity will subrogate one furnishing money to discharge such lien to the rights of the original holder,⁷¹ if such be the intention of the parties.⁷² The lien extends, also, to the interest due upon the purchase money.⁷³

⁶⁷Paschall v. Pioneer Sav. & L. Co. 19 Tex. Civ. App. 102, 47 S. W. 98.

⁶⁸Ibid.

⁶⁹Hicks v. Morris, 57 Tex. 658; Hensel v. International Bldg. & L. Asso. 85 Tex. 215, 20 S. W. 116; Wingate v. People's Bldg. & Loan Sav. Asso. 15 Tex. Civ. App. 416, 39 S. W. 999.

⁷⁰Jackson v. Bradshaw (Tex. Civ. App.) 57 S. W. 878.

⁷¹Warhmund v. Merritt, 60 Tex. 24; Eylar v. Eylar, 60 Tex. 315; Pridgen v. Warn, 79 Tex. 588, 15 S. W. 559; Kallman v. Ludenecker, 9 Tex. Civ. App. 182, 28 S. W. 579.

⁷²McCarty v. Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997.

⁷³Green v. Johnson (Tex. Civ. App.) 44 S. W. 6.

§ 266. "Other Liens."

Whether by "other liens" the contract liens akin to mortgages and deeds of trust, or such as judgment liens and those arising by virtue of levy, were meant, can be of little importance, since none of them can ever be valid. Of course, the levy of an execution or writ of attachment upon land not homestead cannot be defeated by a subsequent dedication of the property,⁷⁴ but if the property be homestead at the time the levy will be a nullity.⁷⁵ It does not create any lien whatever. It can neither be foreclosed during the use of the property as homestead, nor after its abandonment.⁷⁶ The same may be said of levies under ordinary executions.⁷⁷ If a judgment lien ever becomes valid against homestead property upon its abandonment as a home, it is because the lien attaches at the moment of abandonment,⁷⁸ and not at the time of the registration during the use of the homestead property by the family. A purchase by a judgment debtor of land for a homestead will take it free from the lien of his judgment creditor, for the moment the acquisition is made it becomes homestead, and is never subject to the judgment lien.⁷⁹ So, too, a judgment lien being invalid as to homestead, the owner may sell without subjecting the property to the operation of the lien. It remains homestead until it is owned by another.

§ 267. Taxes Due upon the Homestead.

The homestead exemption will avail one nothing as against the taxes that may be due upon such property. This includes special as well as general taxes. But it is only the taxes due upon the homestead itself that it may be sold for,⁸⁰ and the costs incident to such sale.⁸¹ It is held by our supreme court that a spe-

⁷⁴Brooks v. Chatham, 57 Tex. 31.

1021; Glasscock v. Stringer (Tex. Civ. App.) 33 S. W. 677.

⁷⁵Mayers v. Paxton, 78 Tex. 196, 14 S. W. 568.

⁷⁶Freiberg v. Walzem, 85 Tex. 264, 20 S. W. 60.

⁷⁷Willis v. Mike, 76 Tex. 82, 13 S. W. 58.

⁷⁸See Hayes v. Taylor, 17 Tex. Civ. App. 449, 43 S. W. 314.

⁷⁹Redlick v. Williams (Tex.) 5 S. W. 375.

⁸⁰Bean v. Brownwood (Tex. Civ. App.) 43 S. W. 1036; San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496.

⁸¹See Kerr v. Oppenheimer, 20 Tex. Civ. App. 140, 49 S. W. 149; Rollins v. O'Farrel, 77 Tex. 90, 13 S. W.

cial assessment by a city against a homestead for a sidewalk improvement is not a "tax," within the meaning of the Constitution subjecting homesteads to forced sale for the taxes due thereon.⁸² But this liability is by force of the special exception exempting homesteads, and not because the debt is one owing the state. For the exemption generally is against all forced sales, whether the same be at the instance of the state or an individual. The homestead of the family would not be liable to any other demand of the state.⁸³ And a sale for taxes in an amount greater than could be legally assessed against the property conveys no title.⁸⁴

§ 268. Proceeds of Voluntary Sale Exempt, When.

By act of 1897, article 2396 of the Revised Statutes of 1895 was amended by adding thereto the words: "Provided, further, that the proceeds of the voluntary sale of the homestead shall not be subject to garnishment or forced sale within six months after such sale." Prior to this amendment such proceeds could be reached by creditors.⁸⁵ It is not by virtue of any inherent sacredness of the fund thus realized that it is exempt, but wholly by force of the statute cited. Voluntary exchanges of exempt property for property not exempt of itself are not upon the same footing as involuntary exchanges of such property. The former of itself evidences an intention to abandon the exemption. An intention to reinvest the proceeds in another homestead cannot now be at all important. The words "sale" and "proceeds," as used in the article, are doubtless employed in their popular and enlarged, rather than their technical and restricted sense, and the protection of the statute would apply to property other than

⁸²Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803. See Storrie v. Woessner (Tex. Civ. App.) 47 S. W. 837, S. C. (Tex.) 51 S. W. 1132; Hutcheson v. Storrie, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; Lovenberg v. Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024.

⁸³See Central Kentucky Lunatic Asylum v. Craven, 98 Ky. 105, 32 S. W. 291.

⁸⁴Hayes v. Taylor, 17 Tex. Civ. App. 449, 43 S. W. 314.

⁸⁵Whittenberg v. Lloyd, 49 Tex. 633; Mann v. Kelsey, 71 Tex. 609, 12 S. W. 43; Kirby v. Giddings, 75 Tex. 679, 13 S. W. 27; Moursund v. Priess, 84 Tex. 554, 19 S. W. 775; Womack v. Stokes, 12 Tex. Civ. App. 648, 35 S. W. 82.

money taken in voluntary exchange for the homestead. The immunity is from "forced sale" as well as from garnishment for the time indicated. This view is in keeping with the rule that exemption statutes are to be liberally construed with a view to promoting their object.

§ 269. Proceeds of Insurance on.

Our exemption laws are liberally construed. They permit the exemption of the proceeds of an insurance policy upon the homestead, upon the theory that the money thus received stands to the owner in lieu of the building; that it is an involuntary conversion of the home into money, precisely the same as though such home were seized and sold upon process of some sort, or as though the property was destroyed by the act of another. The proceeds in the one case, and the damages in the other, would represent to the owner his home. This exemption is as broad as the exemption of the home itself. It will secure to the owners of the lost home the total amount of the insurance policy, however large, since no limit can be put upon the amount to be placed in improvements upon the homestead.⁸⁶ It continues until such time as it fairly appears that the owner has abandoned the intention of reinvesting the same in another home for himself and family, precisely as the exemption of the homestead itself is for such time as the owner may use the same for the purposes of a home. When it is no longer so used the exemption ceases; and when it reasonably appears that the family no longer contemplate the use of the insurance money for the purposes of a home, then the exemption of that likewise ceases.

This immunity from garnishment applies also to the insurance upon such things as are a part of the homestead by reason of being attached thereto.⁸⁷ While the money thus derived is exempt it is treated as personal property, and the husband may, without the consent of the wife, waive the exemption, and thus permit it to be taken by his creditors;⁸⁸ but, in the absence of an

⁸⁶Chase v. Swayne, 88 Tex. 218, 30 S. W. 1049.

⁸⁷New Orleans Ins. Asso. v. Jame-
son, 6 Tex. Civ. App. 282, 25 S. W.
307.

M. W.—19.

⁸⁸Whiteselle v. Jones (Tex. Civ.
App.) 39 S. W. 405.

agreement, a creditor cannot apply such fund even though he has a mechanic's lien upon the property destroyed.⁸⁹ A waiver, or agreement to pay certain claims from the fund does not work a forfeiture of the exemption as to the remainder.⁹⁰

§ 270. Abandonment of Homestead.

An abandonment of the homestead by the family destroys the exemption, and subjects it to liability for their debts. The protection lasts only so long as the home in the property lasts. Abandonment, like any other question of fact, is one to be shown by the surrounding circumstances, evidencing the intention of the family with reference to the future occupancy of the property for the purposes of a home. It is largely a question of intention. The numerous cases illustrating what is, and what is not, an abandonment, are only so many detailed statements of the circumstances evidencing the intention of the head of the family to occupy, or not, the premises for a home. No specific acts of themselves constitute abandonment, save only as they evidence the intention not again to make of it a home. To illustrate: For the family to remove from the homestead is a circumstance evidencing to a degree the intention to abandon; this removal, when accompanied by the acquisition of a new homestead, is conclusive proof of such intention; while, on the other hand, if it be shown to be for mere temporary purposes,⁹¹ of pleasure or business, it amounts to nothing. The old homestead does not necessarily remain till the acquisition of a new one, but until that time nothing but clear⁹² and satisfactory evidence of an abandonment with the intention not to return will lose to the family its exemption;⁹³ and the burden of proof is upon the one asserting the abandonment, when once the homestead character has been established.⁹⁴ A *prima facie* case of abandonment may be shown; then it is the duty of the homesteader to show

⁸⁹Cameron v. Fay, 55 Tex. 58.

⁹⁰Jones v. Whiteselle (Tex. Civ. App.) 29 S. W. 177.

⁹¹Baum v. Williams, 16 Tex. Civ. App. 407, 41 S. W. 840.

⁹²Ayres v. Shackey, 2 Posey Unrep. Cas. (Tex.) 274.

⁹³Shepherd v. Cassiday, 20 Tex.

24; Gouhenant v. Cockrell, 20 Tex. 96; Moore v. Johnson, 12 Tex. Civ. App. 694, 34 S. W. 771.

⁹⁴Welborne v. Downing, 73 Tex. 527, 11 S. W. 501.

that he entertained the bona fide intention of returning to the property.⁹⁵ The mere intention to abandon while the property is yet occupied for a home will not affect its exempt character,⁹⁶ nor does an offer of the property for sale show an abandonment.⁹⁷ Declarations in disparagement of the right, while they may in a proper case amount to an estoppel, cannot show an abandonment.⁹⁸ The acquisition and occupancy of a new homestead⁹⁹ are, of course, an abandonment of the old, necessarily; but a sale not properly acknowledged by the wife, and receipt of the purchase money where the family continues to reside upon it and does not acquire a new home, is not;¹ nor is a removal and occupancy of rented premises, where the intention to return remains.² Though a removal with the intention not to again return is an abandonment,³ it is not necessary that the minds of the husband and wife both concur in the intention not to return, or the husband alone has the right, if done in good faith, to abandon the homestead, and his abandonment will be binding upon her.⁴

A temporary renting of the homestead will not change its character so long as no other one has been acquired. This renting may be for any length of time so long as it is temporary in its character and not permanent.⁵ Abandonment is almost wholly a question of intention to be gathered from all the facts

⁹⁵*Odum v. Menafee*, 11 Tex. Civ. App. 119, 33 S. W. 129; *Schwartzman v. Cabell* (Tex. Civ. App.) 49 S. W. 113; *Bell v. Greathouse*, 20 Tex. Civ. App. 478, 49 S. W. 258.

⁹⁶*Little v. Baker* (Tex.) 11 S. W. 49.

⁹⁷*Aultman v. Allen*, 12 Tex. Civ. App. 227, 33 S. W. 679.

⁹⁸*Howe v. O'Brien* (Tex. Civ. App.) 45 S. W. 813.

⁹⁹*Focke v. Sterling*, 18 Tex. Civ. App. 8, 44 S. W. 611; *Compare Baum v. Williams*, 16 Tex. Civ. App. 67, 41 S. W. 840.

¹*Huss v. Wells*, 17 Tex. Civ. App. 195, 44 S. W. 33.

²*Building & Loan Asso. v. Guille-*

met, 15 Tex. Civ. App. 649, 40 S. W. 225.

³*Cline v. Upton*, 56 Tex. 319.

⁴*Marler v. Handy*, 88 Tex. 421, 31 S. W. 636; *Building & Loan Asso. v. Guillemet*, 15 Tex. Civ. App. 649, 40 S. W. 225; *ante*, 256; *Wynne v. Hudson*, 66 Tex. 9, 17 S. W. 110.

⁵*Jones v. Robbins*, 74 Tex. 615, 12 S. W. 824; *C. B. Carter Lumber Co. v. Clay* (Tex.) 10 S. W. 293; *Maroney Hardware Co. v. Connellee* (Tex. Civ. App.) 25 S. W. 448; *Harbison v. Tennison* (Tex. Civ. App.) 38 S. W. 232; *Wynne v. Hudson*, 66 Tex. 1, 17 S. W. 110; *Russell v. Nall*, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901; *Hines v.*

and circumstances surrounding each particular case, and view of the facts of the various reported cases is unnecessary. But the abandonment must be voluntary,—that is, not the result of force, process of courts, and the like.⁷ The abandonment may be of part, only, of the homestead, and may be the act of the husband alone, or of husband and wife conjointly.⁸

§ 271. If in Fraud of the Wife.

As it is the prerogative of the husband to select the homestead in the first place, so he may abandon it at pleasure, and

Nelson (Tex. Civ. App.) 24 S. W. 541; Hensley v. Shields, 6 Tex. Civ. App. 136, 25 S. W. 37; Prufrock v. Joseph (Tex. Civ. App.) 27 S. W. 264; Ford v. Fosgard (Tex. Civ. App.) 25 S. W. 445, Reversed on other grounds in 87 Tex. 185, 25 L. R. A. 155, 27 S. W. 57; Bailey v. Bauknight (Tex. Civ. App.) 25 S. W. 56; Williams v. Cleveland, 18 Tex. Civ. App. 133, 44 S. W. 689; Shook v. Shook, 21 Tex. Civ. App. 177, 50 S. W. 731.

⁷See Rollins v. O'Farrel, 77 Tex. 90, 13 S. W. 1021; Kutch v. Holley, 77 Tex. 220, 14 S. W. 32; Portwood v. Newberry, 79 Tex. 337, 15 S. W. 270; McElroy v. McGoffin, 68 Tex. 208, 4 S. W. 547; Reece v. Renfro, 68 Tex. 192, 4 S. W. 545; Cooper v. Basham (Tex.) 19 S. W. 704; Sanders v. Sheran, 66 Tex. 655, 2 S. W. 804; Kaufman v. Fore, 73 Tex. 308, 11 S. W. 278; McDannell v. Ragsdale, 71 Tex. 23, 8 S. W. 625; Milburn Wagon Co. v. Kennedy, 75 Tex. 212, 13 S. W. 28; Blackburn v. Knight, 81 Tex. 326, 16 S. W. 1075; Newton v. Calhoun, 68 Tex. 451, 4 S. W. 645; Langston v. Maxey, 74 Tex. 155, 12 S. W. 27; Bowman v. Watson, 66 Tex. 295, 1 S. W. 273; Harle v. Richards, 78 Tex. 80, 14 S. W. 257; Malone v. Kornrumpf, 84

Tex. 454, 19 S. W. 607; Du Alexander, 83 Tex. 441, 18 S. W. 817; Hill v. Hill, 85 Tex. 10 W. 1016; Willis v. Pounds, Civ. App. 512, 25 S. W. 715; v. Parks (Tex. Civ. App.) 2 S. W. 216; Nash v. Herring, 5 Tex. Civ. App. 95, 23 S. W. 739; J. Robbins, 3 Tex. Civ. App. 20 S. W. 69; Sanburn v. Deal, 3 Tex. Civ. App. 385, 22 S. W. 192; Cockrell, 9 Tex. Civ. App. 51 S. W. 129; Lumpkin v. Nichols, Tex. Civ. App. 108, 30 S. W. 108; Jamison v. Lewis (Tex. Civ. App.) 35 S. W. 954; Hinz v. Moxley, Tex. Civ. App. 193, 35 S. W. 100; Davis v. Taylor (Tex. Civ. App.) 35 S. W. 543; Farmer v. Hale, Tex. Civ. App. 73, 37 S. W. 164; v. Lipp, 16 Tex. Civ. App. 16 S. W. 824; Keller v. Beattie (Tex. Civ. App.) 34 S. W. 667; L. Bonnell, 14 Tex. Civ. App. 1 S. W. 250; Gunn v. Wynne (Tex. Civ. App.) 43 S. W. 290; Gray (Tex. Civ. App.) 31 S. W. 100; Torres v. Cuneo (Tex. Civ. App.) 31 S. W. 828; Alexander v. (Tex. Civ. App.) 56 S. W. 68.

⁸King v. Harter, 70 Tex. 57, 13 S. W. 308.

⁹O'Brien v. Woeltz (Tex.) 10 S. W. 943.

will be binding upon the wife unless done from an evil motive, for the purpose of depriving her of her exemption. This he would have no power to do.⁹ She would not be bound by any act of his looking to a divestiture of the homestead character of property without her consent, done for the purpose of depriving her of the exemption.¹⁰ But nice questions may arise here. The husband may abandon the homestead without the wife's consent, and if she refuses to follow him without cause she is guilty of desertion. If she follows him, even unwillingly, ordinarily there can be no homestead rights in the property thus abandoned, especially where innocent persons deal with it. She may, in a proper case to be noticed in another section,¹¹ maintain such a use or occupancy as to put purchasers upon notice of her rights, but this is the exception, since the rule is that her home follows that of her husband. But the husband cannot, solely for the purpose of depriving his wife of her homestead, abandon it without her consent.

§ 272. Husband and Wife Living Apart.

The maintenance of the exemption does not necessitate the uninterrupted presence of the wife, any more than it does of the husband. Either or both may absent themselves upon purposes of pleasure or business, and yet not abandon their homestead. So long as it is the wife's home, no matter where she may temporarily be, the exemption continues. As in other cases, her intention is paramount; if she intends that her absence shall not be permanent, but to return to the property, then she in no manner loses her rights.¹² Where parties are married elsewhere, and the husband precedes the wife here and acquires property, or owns it upon marriage, contemplating a residence in this state, the wife's rights attach, for in law his home is hers.¹³ It

⁹Smith v. Uzzell, 56 Tex. 315;
Newman v. Farquhar, 60 Tex. 640.

¹⁰Dykes v. O'Connor, 83 Tex. 160,
18 S. W. 490.

¹¹Post, § 272.

¹²Clements v. Lacy, 51 Tex. 150;

Reinstein v. Daniels, 75 Tex. 640, 13
S. W. 21; Gibbons v. Hall (Tex. Civ.
App.) 59 S. W. 814.

¹³Lacey v. Clements, 36 Tex. 661;
Henderson v. Ford, 46 Tex. 627.

is held in Kentucky that where the wife's absence is due to confinement in an asylum she will not forfeit her rights.¹⁴

But the wife cannot, without good excuse, abandon the home which her husband has provided for her, and yet claim the benefit of the exemption to a wife. But her conduct must be innocent and not caused by the conduct of the husband;¹⁵ for if her husband's treatment or conduct toward her is of such a character as to put her life or person in danger, or to seriously render her life living with him insupportable, then it could not be considered that by fleeing for her safety she would thereby forfeit the rights guaranteed to every wife by our laws. This would be to place a premium upon fraud, and requiring her to purchase her freedom at a sacrifice never contemplated by law or morals. The rights are not so easily defined in other cases of separation. In *Crockett v. Templeton*, 65 Tex. 134, Crockett and his wife by mutual agreement separated and divided between them the land of their homestead; the wife with her children continuing to occupy the portion allotted to her, as her homestead, and the husband with his children by a former marriage removing to another county and renting land. To divest the wife of any homestead interest which she might have in the land allotted to the husband, if they jointly conveyed the same to a third person, who subsequently reconveyed it to the husband. They were not divorced. Creditors of the husband seized and sold the land allotted to him, and upon contest between the purchasers of the sale and the husband, the court, in holding Crockett's homestead exempt, uses the following language: "That it was part of the homestead of Crockett and wife prior to their separation admits of no doubt. Mrs. Crockett continued to reside upon the other part of the 82-acre tract, and by the deed to Kentucky it was her purpose to divest herself of all claim whatsoever in the land in controversy. She has abandoned her homestead in part to a part of their homestead, but in that part her husband

¹⁴*Central Kentucky Lunatic Asylum v. Craven*, 98 Ky. 105, 32 S. W. 291. Compare *ante*, § 259.

¹⁵*Trawick v. Harris*, 8 Tex. 312; *Earle v. Earle*, 9 Tex. 630; *Sears v. Sears*, 45 Tex. 557; *Newland v. Hol-*

land, 45 Tex. 588; *Schwartz v. Necker*, 1 Posey Unrep. Ca. 325; *Duke v. Reed*, 64 Tex. 1; *Cockrell v. Curtis*, 83 Tex. 436, 10 S. W. 436.

tained the equitable ownership, with the purpose of using it as a home whenever he is in a condition to build upon it. Since the division he has never lived with his wife upon her part of the tract, but he has acquired no other home. Without her consent he can mantle no other habitation with homestead protections. Until he and she unite in abandoning the part she occupies, that is their homestead. He doubtless no longer asserts an interest in her part of the land, but still it cannot be taken for his debts." While this discussion was only incidentally necessary, still it doubtless intimates the true rule in such cases, which is thought to be that in case of separation without divorce, husband and wife still being in law one family, one homestead will be protected. If they occupy different portions of that homestead it can make no difference, since it will be protected as long as either occupies it. The two combined, however, must not exceed the constitutional limitation of a homestead for a family, for there cannot be two homesteads to them. By the expression in the opinion above quoted, that "without her consent he can mantle no other habitation with homestead protections," it is probably meant to say no more than that a new homestead cannot be acquired by the husband for the purpose of depriving the wife of her interest in the old one. This would be a fraud upon her, and the fact of her continuing to occupy the property as a home, along with the fact of the separation, would be sufficient to put all upon notice of the husband's purposes in destinating the new homestead. If the separation is not the result of the wife's inexcusable desertion, the husband can acquire no homestead in which she cannot assert her rights if she sees fit.¹⁶ Where husband and wife are not living together, it would doubtless be proper to require that both concur in the abandonment of the old homestead before it should be held to have lost its exempt character, and preference given to it rather than to any new acquisition made by either spouse. But where the wife has abandoned her husband and removed from the state with another man, her intention to return and claim the homestead will not

¹⁶Bradley v. Deroche, 70 Tex. 465,
7 S. W. 779.

prevent the husband's abandoning the same and selling it to a person who has no notice of her intention.¹⁷

§ 273. Miscellaneous Exemptions.

In addition to the homestead, the following property is also exempted by law to every family: "All household and kitchen furniture; any lot or lots in a cemetery held for the purpose of sepulture; all implements of husbandry; all tools, apparatus, and books belonging to any trade or profession; the family library and all family portraits and pictures; five milch cows and their calves; two yoke of work oxen, with necessary yokes and chains; two horses and one wagon; one carriage or buggy; one gun; twenty hogs; twenty head of sheep; all saddles, bridles, and harness necessary for the use of the family; all provisions and forage on hand for home consumption; and all current wages for personal services.¹⁸ The exemption of these things is to the family, but there is no limitation placed upon the right of the husband, if the owner, to dispose of them without the wife's consent. This he may do. He may waive the exemption,¹⁹ or sell or mortgage the property thus protected. No individual or special rights exist in this property as in homestead.

¹⁷Moore v. Dunn, 16 Tex. Civ. App. 371, 41 S. W. 530.

¹⁹Whiteselle v. Jones (Tex. Civ. App.) 39 S. W. 405.

¹⁸Rev. Stat. art. 2395.

CHAPTER XVII.

MARRIAGE SETTLEMENTS.

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|-----------------------------|-------------------------------|
| 1. Statute. | § 277. Fraud. |
| 2. Record of Contract. | § 278. Postnuptial Contracts. |
| 3. Construction; Intention. | § 279. Conflict of Laws. |

4. Statute.

Parties intending to enter into the marriage state may enter into what stipulations they please, provided they be not contrary to good morals, or to some rule of law; and in no case shall they enter into any agreement, or make any renunciation, the object of which would be to alter the legal orders of descent, either in respect to themselves, in what concerns the inheritance of their children or posterity, which either may have by any other person, or in respect to their common children; nor shall they make any valid agreement to impair the legal rights of the husband over the person of the wife, or the persons of their common children.”¹

“Every matrimonial agreement must be acknowledged before an officer authorized by law to take acknowledgments to deeds, and attested by at least two witnesses; the minor capable of contracting matrimony may give his consent to any agreement which this contract is susceptible of, but such agreement must be made by the written consent of both parents, if both be living; if not, by that of the survivor; if both be dead, then by the written consent of the guardian of such minor.”² “No matrimonial agreement shall be altered after the celebration of the marriage.”³

Rev. Stat. art. 2963.
Ibid. art. 2964.

¹Ibid. art. 2965.

“When the wife, by a marriage contract, may reserve to herself any property, or rights to property, whether such rights be *in esse* or expectancy, such reservation, to be valid as to the subsequent purchasers or creditors of her husband, must be acknowledged and recorded as provided by law.”⁴

A contract not authenticated as required by statute is inoperative to affect the rights of persons other than the parties and their privies.⁵ No formal contract is necessary between the parties themselves. A simple contract, as a note and mortgage executed by a man to a woman in consideration of marriage, may be enforced after the consummation of the marriage.⁶

§ 275. Record of Contract.

It is only where it is sought to affect subsequent purchasers and creditors of the husband, that the registration of the contract is required. As between the parties they may make such “agreements as they please,” provided they do not contravene any law. This contract of reservation to the wife can certainly refer to such property or rights, only, as would, were it not for such contract, belong to the husband or the community. There would be no necessity for her reserving to herself that which would be hers without such reservation. And there could be no necessity for a registration of her own property in any manner whatever, either as to purchasers or creditors of the husband, or any other persons. It has been seen that no registration of her separate property is required.⁷ Then it can only be where she reserves to herself property that would ordinarily belong to the husband or the community, that she must record her contract for otherwise persons dealing with the husband would be warranted in assuming the property to be subject to his disposition. The law will not allow snares to be set for those who in good faith make purchases or extend credit. And unless she records her contract, she cannot introduce it in evidence for the purpose of establishing any rights thereunder whatever,—neither the original nor a recorded certified copy of the same.⁸

⁴Ibid. art. 2966.

⁵*Ante*, §§ 211, 212.

⁶Ellington v. Ellington, 29 Tex. 2.

⁷McDuffie v. Greenway, 24 Tex.

⁸McCormick v. McNell, 53 Tex. 15. 625.

The unrecorded contract is not only valid between the parties and their heirs, but as to subsequent purchasers with notice, or without valuable consideration.⁹ If the subject of such contract be real property, it must be recorded in the county where the land, or a part thereof, is situated.¹⁰ If personal property, record must also be had in the county where such property shall remain, and if the owner permit any other person in whose possession the same may be, to remove it from such county to another, the instrument must likewise be recorded in the county to which such property has been removed within four months, under the penalty of its being void as to all creditors and purchasers for a valuable consideration without notice.¹¹ The registration of such contracts, in so far as lands may be involved, is governed largely by the law governing the registration of deeds and other conveyances.

§ 276. Construction; Intention.

In *McLeod v. Board*, 30 Tex. 238, Mary W. Michan and Benjamin S. Mitchell, in contemplation of marriage, entered into a contract by the terms of which the said Mary conveyed to Mina McCoy, also a party to the contract, two slaves, as follows: "Granted, bargained, sold, and delivered to Mina McCoy, . . . the said negroes, to have and to hold to him, the said Mina McCoy, his heirs, executors, and administrators, the said slaves, Simon and Bina, with the future issue and increase forever, in trust and for the sole and separate use of the said Mary for and during her natural life, not subject to the debts, encumbrances, charges, demands, power, or control, of the said Benjamin, or any future husband, to pay over to the said Mary the hire aforesaid of the labor of said slaves, and their future issue and increase, to and for her sole and separate use; or at the option and choice of her, the said Mary, to permit her, notwithstanding her coverture, to hold and possess, use and enjoy, said slaves with their issue and increase, without the same or any part thereof, or their hire, or the profits of their labor, being in any way subject to the debts, liabilities, or control of the said Benjamin,

⁹Rev. Stat. arts. 4640, 4643.

¹¹Ibid. art. 4651

¹⁰Ibid. art. 4641.

or any future husband that she might have; and that if the said Mary should depart this life without leaving issue alive at the time of her death, and without disposing of her separate estate by last will and testament, then and in that case the said Mina McCoy should hold said slaves with their issue and increase, in trust, to convey the same to her, the said Mary's heirs at law, to be divided according to the statutes of the state of South Carolina." The parties removed to Texas, where Mrs. Mitchell died without children or their descendants, without father or mother, brother or sister, except a half sister who was plaintiff in the action, which was one for the possession of the slaves. The court in construing the intention of the husband, said: "The demurrer seems to have been sustained upon the supposition that the clause in the contract under which the plaintiffs set up title, that in case the *cestui que trust* in the deed should die, without issue, at the time of her death, and without having disposed by last will and testament of the property settled in said deed to her separate use, said trustee should hold the property in trust to convey the same to the heirs at law of the *cestui que trust* to be awarded according to the statutes of the state of South Carolina, should be construed as words of limitation, and not of purchase, in favor of such heirs. . . . It may be admitted that the language used in this deed brings it within the rule in *Shelly's Case*, and that the entire trust estate vested in the *cestui que trust*, without condition or remainder. Yet the question still remains, whether, by the marriage contract, the husband has not excluded himself from all interest in the property, *jure mariti*, as well after the death of the wife as during her life. That the husband may be excluded, by an express stipulation, from all interest or participation in the distribution, on the death of the wife, of property settled by marriage contract to her sole and separate use, is not a matter of dispute. Such exclusion unquestionably must be clearly and obviously manifested by the contract; but when this is the case, effect must be given to the intention of the parties in this as in other particulars." It must be borne in mind that under the laws of the state of South Carolina, that state being a common-law state, the wife's property would have vested, immediately upon marriage, in the husband, and that our court merely announced the proper rule of

construction in such cases, and was not passing upon the validity of the stipulations contained in the contract if measured by our statute. With us it is not within the power of the husband and wife to alter, by contract, the legal order of descent either with respect to themselves, their children by any other person, or their common children.¹² The thing of controlling importance is the real intention of the parties. The incidental matters of registration, and stipulation against altering the legal orders of descent, are requirements and limitations that are but fair to innocent persons dealing with the head of the family, and children and other heirs of the spouses. As in the case of all other transactions between the spouses, the proof of the intention should be clear and satisfactory.¹³

§ 277. Fraud.

There is never a time when the utmost fairness from husband to wife will not be exacted, and the matter of marriage contract forms no exception. For obvious reasons, the woman in such a contract is at a disadvantage; she places in her future husband the utmost confidence and it is not a case of strangers dealing with each other at arms' length. In almost every case—inferior to the man in business experience—she is not in a position to correctly weigh and determine the magnitude of the rights she is called upon to relinquish, or grant, as the case may be, at best, and certainly nothing should be by him kept back from her that would enable her to act in the matter at least intelligently. The legislature has seen the importance of protecting the inexperienced in such contracts, and provision is made that in case of minors contracting the parents or guardian shall sign the contract. The parties stand in a confidential relation, and a full disclosure of the circumstances and property of each ought to be made. As was said in a New York case:¹⁴ “The authorities go very far in holding that the courts require strict proof of fairness when called upon to enforce an antenuptial contract against

¹²Groesbeck v. Groesbeck, 78 Tex. 664, 14 S. W. 792.

¹⁴Pierce v. Pierce, 71 N. Y. 154.

¹³Branham v. Scott (Tex. Civ. App.) 51 S. W. 38.

the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust, and unreasonably disproportionate to the means of the husband. The rule undoubtedly is, that in such a case every presumption is against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement." Undoubtedly, a marriage contract, although it may deprive the wife of many of her marital rights in her husband's property, will be enforced if it appears that there has been no unfair means employed in inducing its execution. If she be familiar with his circumstances and fortune, or have the fair opportunity of knowing them, and voluntarily, without undue influence, consent to relinquish her wifely portion, she may of course do so. But if she be imposed upon, by taking advantage of her ignorance, her inexperience, or her affection, or if information is withheld from her, the disclosure of which would probably cause her to act differently, it would be altogether inequitable to permit such a contract to stand.¹⁵

The courts will duly consider the sufficiency of marriage as a consideration for these contracts, and not measure them exclusively by their pecuniary advantage to the wife. It is not the business of courts to make contracts for parties, but if they discover that a contract which, if intentionally based upon the sole consideration of marriage, would be sufficient, was really superinduced by the positive fraud, or the omission to make disclosures which would amount to fraud, they do not lack power to annul them in favor of the injured party. We have said that marriage alone would be a sufficient consideration for a marriage contract. Indeed a consideration more valuable cannot well be imagined. And the damages flowing from a breach of such contract are measured pecuniarily by the means of the party breaching; so to this extent a woman has a valuable right in the consummation of a contracted marriage, which she should not be required to relinquish by marriage contract, unless it very

¹⁵Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868; Simpson v. Simpson, 94 Ky. 586, 23 S. W. 361.

clearly appears that she did so in consideration of marriage alone, and upon a full understanding of her rights, and their curtailment by reason of the contract.

§ 278. Postnuptial Contracts.

A marriage contract cannot be altered after the celebration of the marriage. Nor can husband and wife by mere agreement between themselves change the character of their property so as to convert community into separate, or separate into community, property.¹⁶ It is held in *Groesbeck v. Groesbeck*, 78 Tex. 664, 14 S. W. 792, that a postnuptial contract entered into between the husband and wife, by which the wife, upon the death of her husband, was to be deprived of her distributive share of his property, was void under the law, as being an agreement the object of which was to alter the legal order of descent. While there is no statute forbidding such contracts between husband and wife, as there is in the case of marriage contracts, yet on principle it would seem that such a contract ought not to be upheld. An agreement entered into during marriage, by which each spouse is to retain his separate property with the increase thereof, is a violation of the spirit of our law, if not the letter, and therefore void.¹⁷ Yet the husband and wife may make gifts to each other of their property freely, or will it at their death, and but little real distinction can be seen between these and the transactions under discussion, so far as results are concerned. Viewed as an agreement merely, having for its object the alteration of the orders of descent, the contract is void.

Postnuptial contracts are not favored by the law. They may be enforced, but it must appear that they are just, equitable, and fair, and must be such as appeal to the conscience of the court.¹⁸ The rule as announced by Bishop, to the effect that the comparative value of the estate conveyed to the wife by the husband, with that released by her, will be considered in determining the validity of such contracts, has been approvingly referred to by our

App. 1, 37 S. W. 652.

¹⁶*Ximines v. Smith*, 39 Tex. 50;

¹⁷*Cox v. Miller*, 54 Tex. 24; *ante*, *Green v. Ferguson*, 62 Tex. 525.

§ 172.

¹⁸*Engleman v. Deal*, 14 Tex. Civ.

supreme court.¹⁹ So, on the whole, it may be said that, as at common law, postnuptial contracts are not favorably regarded by the law, they are rarely upheld, and are never, except in those cases where to deny them would be more inequitable than to uphold them. They must be fair alike to husband and wife; and it is but proper to add that they are then enforced more from equitable considerations than from any intrinsic strength which they possess as contracts.²⁰

§ 279. Conflict of Laws.

“The general rule,” says Chief Justice Wheeler in *Castro v. Illies*, 22 Tex. 479, “irrespective of the question of the effect of a change of domicil, is undoubted, that where there is an express nuptial contract, ‘if it speaks fully to the very point,’ it will generally be admitted to govern all the property of the parties, not only in the matrimonial domicil, but in every other place under the limitations and restrictions which apply to other cases of contracts, that they are not in contravention of the laws or policy of the country where they are sought to be enforced, or with the rights of its own citizens.” If the contract be expected to furnish the rule of property to husband and wife in countries other than that of its execution, such must be the clear import of its language. It is not sufficient that it defines the rule in the jurisdiction where made, or that it even incorporates the law of such place. This would tend to show that the contract was made with reference to the law of the place of contract only. Indeed, such is the presumption, until a contrary intention is clearly shown. “Where there is an express contract, that governs as to all acquisitions and gains before the removal. Where there is no express contract, the customary law of the matrimonial domicil governs in like manner. But in both cases all acquisitions and gains, made after the removal, are governed by the law of the actual domicil.”²¹ “It will act directly on movable property everywhere. But as to immovable property in a

¹⁹*Proetzel v. Schroeder*, 83 Tex. 684, 19 S. W. 292.

²⁰*Moor v. Moor* (Tex. Civ. App.) 57 S. W. 992.

²¹*Story, Conf. of Laws*, 177.

foreign territory, it will, at most, confer only a right of action, to be enforced according to the jurisprudence *rei sitæ*.”²² Such is the effect of the ordinary contract, where no express stipulations provide with reference to acquisitions to be made in a foreign state. But if the instrument contains statements which make clear the intention of the parties that its terms should apply alike to property acquired in any jurisdiction whatever, such will be its effect. So, too, it would be valid if it were made in contemplation of a change of domicil, or with reference to the law of a particular foreign jurisdiction; but this would have to appear very clearly by the instrument itself, or as between the parties by the circumstances evidencing their real intention.²³

²²Ibid. 143, 184; Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974.

²³See *ante*, §§ 27, 34, 208, 235.

PART IV.

PART IV.

ACTIONS.

CHAPTER XVIII.

RIGHT OF, BY, AND AGAINST, GENERALLY.

§ 280. Right to Appear in the Courts
as Party Litigant.

§ 282. — Instances.

§ 283. — Suing Her Husband.

§ 281. May Appear in Her Own
Name.

§ 280. Right to Appear in the Courts as Party Litigant.

The law recognizes the wife's right to sue, and her liability to be sued. I do not quite like the expression found in some of the cases that the law "confers" upon the wife the power to litigate. I prefer to think the courts of the country are at all times open to all our citizens, and that this right to have one's grievances thus determined should not be denied to the humblest, whether that person be male or female, married or unmarried; and that this right exists in all instances where there is a wrong to be redressed. It is not the business of statutes to "confer" the right on anyone, but only to regulate it. I prefer to believe that the section of the Bill of Rights¹ which declares that "all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law," includes women, notwithstanding they may be married. The law no more "confers" upon a married woman the right to appear in court, than it "confers" upon a married man the right. It has simply not undertaken to deny it to her altogether,—is the most that can be said. If this class of persons, like minors and lunatics, were incapable of appearing for

¹Const. art. 1, § 13.

themselves, then the law ought to provide for guardians *ad litem* to conduct their litigation for them. But while she may appear either as a plaintiff or a defendant, yet the policy of our law has been to limit that right and liability to certain well-defined cases, and not to recognize her as entirely free from disability in this respect. Her abridged rights in this respect are analogous, to some extent, to her abridged right to contract, alienate her property, etc. Having then, in some instances, the capacity to sue and be sued, she is, in such instances, held to the same diligence, conclusiveness, rules, and results generally, of other litigants not laboring under disabilities, except where specific exemptions are made to her by law.² But while thus strict with her in this respect, the law is correspondingly liberal in another: it allows her all the rights which are usually incidental to the right to litigate, such as the right to employ counsel, make compromise, waive irregularities, *et cetera*,³ and to do these in person, or through someone duly authorized by her. Her husband is not necessarily her agent to bind her in suits, by agreement or otherwise,⁴ except possibly in actions by him for the recovery of her separate property.⁵ It presumes that she is capable of conducting her litigation as will be best conducive to her own welfare, and prescribes no different method of procedure in her behalf, nor holds the result of that litigation less conclusive than if the litigant were a man or a *feme sole*. She may be sued upon her contracts or for her torts, and is brought before the courts in precisely the same manner as is her husband.

§ 281. May Appear in Her Own Name.

When the wife may and may not sue and be sued, will be discussed in the succeeding chapter on parties. But this much we may say here as prefatory to that discussion: Wherever she is authorized to sue alone, she does so in her individual capacity and without the aid of *prochein ami*, and without having first obtained permission of the court to prosecute such suit. If the

²Cayce v. Powell, 20 Tex. 767.

³Laird v. Thomas, 22 Tex. 276;
Baxter v. Dear, 24 Tex. 17; Urquhart v. Womack, 53 Tex. 616.

⁴Winter v. Texas Land & Loan Co. (Tex. Civ. App.) 54 S. W. 802.

⁵See *post*, § 321.

facts make clear her right, it will be granted as matter of right, and cannot be denied her. In fact no express or specific grant of power is necessary to be given by the court.⁶ And where she may be sued upon a liability growing out of her contract or her tort, the prosecution of the action is against her in her own name, and the judgment, when recovered, so rendered. She appears and defends in her individual capacity as though she were sole. The law requires, as will be seen subsequently, that the husband be jointly sued with her, but this is not because of his individual liability. He is not required to appear and defend for her, and she may not depend upon his doing so; if she does, her want of diligence will not be excused. So, generally, it may be said that wherever the wife suffers an injury in her lands, goods, person, or reputation, by the unlawful act or agency of another; or where, under any of the rules of law, she is liable upon her contract or for her tort, subject to the regulations of the statute as to parties, she may in the one case have and assert her cause of action, and in the other be called upon to make reparation.

§ 282. — Instances.

The rule is thought to be without exception, that wherever the wife has a separate and individual right, if the same be a cause of action against another, she may assert it in her individual capacity by showing that her husband fails or refuses to bring or join therein. She may sue for the recovery of her property, for the collection of her debts, to restrain the sale of her property as her husband's,⁷ file a petition in bankruptcy,⁸ or seek a guardianship in certain cases, and whether her husband be willing or not. The requirements of the statute with reference to the joinder of the husband are but restrictions placed upon the manner of her exercising a right which the law has not taken away from her, and are designed for her protection, not intended to curtail her privileges.

⁶McIntire v. Chappell, 2 Tex. 378;

⁸Black, Bankruptcy, 28.

O'Brien v. Hilburn, 9 Tex. 297.

⁷Purinton v. Davis, 66 Tex. 455, 1 S. W. 343.

§ 283. — Suing Her Husband.

As further illustrating the right of the wife to appear in court in her individual capacity, and without the aid of next friend or anything of the kind, may be mentioned the ordinary action for divorce.⁹ But there are instances where the wife cannot sue the husband. For any injury he may do her in her person or reputation, she is without remedy.¹⁰ Not only can she not sue him while he is her husband, but after obtaining a divorce from him she still cannot sue him on account of such injuries arising while they were husband and wife. It is the legal, and certainly moral, duty of the husband to support his wife, to furnish her shelter, food, and raiment; yet if he fails in this respect she cannot by suit compel such support.¹¹ The law, however, more mindful of her property rights than her person or good name will not allow the husband to do her an injury in respect to these. If he unlawfully dispose of the same, and suit become necessary, she may sue; and if he be a necessary party, she may make him a defendant.¹² It has been held that the wife might maintain a suit against her husband, and obtain a judgment foreclosing a mortgage lien executed by him upon community property securing the debt to her, and have the property sold for the satisfaction of such debt.¹³ And again it has been held that an action will lie in the name of the wife against her husband on promissory note executed by him to her, in consideration of moneys, her separate property, loaned by her after marriage to her husband.¹⁴ So, too, it has been further held that since she can maintain a suit against her husband for the enforcement of a debt, she is also entitled to all the processes of court allowed to other creditors, calculated to aid her in the enforcement of such collections; such as attachment, sequestration, and the like.¹⁵ She stands exactly as other creditors, having neither preference nor disadvantage.¹⁶ No valid objection can be urged

⁹Wright v. Wright, 3 Tex. 168.

¹⁰Nickerson v. Nickerson, 65 Tex. 281.

¹¹Trevino v. Trevino, 63 Tex. 650.

¹²O'Brien v. Hilburn, 9 Tex. 297.

¹³Price v. Cole, 35 Tex. 461.

¹⁴Hall v. Hall, 52 Tex. 294; Martin Brown Co. v. Perrill, 77 Tex. 113 S. W. 975.

¹⁵Ryan v. Ryan, 61 Tex. 473.

¹⁶Holloway v. Shuttles, 21 Tex. Civ. App. 188, 51 S. W. 293.

against the propriety of thus allowing the wife to maintain such a suit, notwithstanding the familiar and long-cherished doctrines of the common law are thereby overturned. If we recognize separate identity,—separate estates, and valid contracts between husband and wife,—it is irresistible that we must also recognize her further right to the enforcement of such contracts, and in a proper case permit her the benefit of the writs of attachment, sequestration, injunction, and the like, to which any other creditor would, under similar circumstances, be entitled.

CHAPTER XIX.

PARTIES.

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| § 284. Wife as a Plaintiff. | § 291. Actions for Alienating Husband's Affections. |
| § 285. Her Suits Instituted before Marriage. | § 292. When Husband is Insane. |
| § 286. Husband should be a Party Plaintiff. When. | § 293. Wife as a Defendant. |
| § 287. Actions Concerning Community Property. | § 294. When She may be Sued. |
| § 288. — by Parent for Injuries Resulting in Death of Child: Statute. | § 295. — Concerning the Homestead. |
| § 289. — for Penalties and Forfeitures under the Statute. | § 296. Husband a Necessary Defendant with Her. |
| § 290. Actions Concerning the Homestead. | § 297. She is not a Necessary Defendant, When. |

§ 284. Wife as a Plaintiff.

The wife may be a plaintiff in all suits for the recovery of her separate property: but she is not the only person authorized to bring such suit. Her husband may bring it, either by himself or jointly with her. But in the event he fails or neglects to do so, then she may bring it alone.¹ No definite time is allowed the husband within which to bring the suit. When a cause of action has arisen in favor of the wife, and the husband fails or neglects it, then she may sue. Or if he refuses for any reason. Where the husband has abandoned the wife, and thus ceased to act as the head of the family, she is authorized to take such steps as are necessary for the protection of her property, whether i

¹Rev. Stat. art. 1200.

²Wallace v. Finberg, 46 Tex. 35:

Edwards v. Dismukes, 53 Tex. 605 =

John v. Battle, 58 Tex. 591.

by suit or otherwise;³ and in such case it can make no difference whether the suit be concerning her separate property or the community, for under such circumstances she is not only a joint owner of the community, but entitled to its possession and control.⁴ She may appear alone as an applicant for the guardianship of her minor children by a former marriage. The law in such cases, upon the death of the father, makes her the legal guardian of the persons and estates of her minor children upon her application, and if she be again covert, there is no necessity for joining her husband in the application.⁵ Again the statute permits the wife to make an application to the county court for support for herself and education of her children from the proceeds of her lands, where her husband fails to properly supply these things.⁶ It is clear the joinder of the husband in this character of case is inconsistent with the purpose of the act, as he is the defendant in the action, if it may be called such. She is a necessary party plaintiff with her trustee in an action concerning the trust estate, where the trust instrument does not authorize the trustee to sue.⁷ In all cases where by law she is authorized to sue, she does so in her individual capacity, doing all things necessary to be done in the furtherance of her suit precisely as though she were sole.⁸ She is not a necessary, nor even proper, party plaintiff with her husband in a suit concerning his separate property, yet her joinder is not reversible error unless an injury to the defendant be shown.⁹

285. Her Suits Instituted before Marriage.

"A suit instituted by a *feme sole* shall not abate by her marriage, but upon a suggestion of such marriage being entered on the record, the husband may make himself a party to such suit, and prosecute the same as if he and his wife had been originally

³Black v. Black, 62 Tex. 296; Norman v. Davis, 83 Tex. 32, 18 S. W. 10.

⁴San Antonio & A. P. R. Co. v.illum (Tex. Civ. App.) 30 S. W. 97, S. C. (Tex.) 31 S. W. 356; Texas & P. R. Co. v. Watkins (Tex. Civ. App.) 26 S. W. 760, S. C. Af-

firmed, 88 Tex. 20, 29 S. W. 232.

⁵Cook v. Bybee, 24 Tex. 278.

⁶Rev. Stat. art. 2972.

⁷Monday v. Vance, 11 Tex. Civ. App. 374, 32 S. W. 559.

⁸Chapman v. Allen, 15 Tex. 278.

⁹Missouri, K. & T. R. Co. v. Starr, 22 Tex. Civ. App. 353, 55 S. W. 393.

plaintiffs in such suit."¹⁰ It is not obligatory upon the husband to make himself a party, and his failure to do so will not affect the wife's right to maintain the further prosecution of the case in her own name. In such a case, upon the suggestion of the marriage by the defendant in the case, the court should afford the husband an opportunity to make himself a party plaintiff, and prosecute the suit; but, should he decline, there is no reason why the wife could not maintain it alone.¹¹ Upon the husband's joining the wife in such a case, no new citation need issue to the defendant, since there is no new cause of action, but a continuance of the old, with possibly the parties changed.¹²

§ 286. Husband should be a Party Plaintiff, When.

It is the undoubted policy of our laws to encourage the husband's conducting the wife's litigation when he can properly do so, but never to deny her the right when he fails or refuses. In all actions, I believe without exception, where the wife is authorized to sue, the husband may sue for her, unless it be in those cases where his interests conflict with hers, in which case it is not proper for him to be even joined as a plaintiff.¹³ But in actions which have for their object the recovery of the wife's separate property, he is authorized by law to conduct the same as plaintiff, either alone or jointly with his wife,¹⁴ and it is optional with him whether he will sue in his own name or jointly with her.¹⁵ He is for this purpose made the agent of his wife by law, and his acts in this capacity, done in good faith, must be held to be binding and conclusive upon his principal.¹⁶ His right to sue for her is not confined to those cases which have for their object the recovery of specific articles of property, but the act is to be more liberally construed. He may sue for a conversion of her property,¹⁷ to recover damages for an injury to the

¹⁰Rev. Stat. art. 1252.

¹¹San Antonio Street R. Co. v. Cailloutte, 79 Tex. 341, 15 S. W. 390.

¹²Church v. Chicago & A. R. Co. 119 Mo. 203, 23 S. W. 1056.

¹³Hartley v. Frosh, 6 Tex. 208; McKay v. Treadwell, 8 Tex. 176;

Marston v. Ward, 35 Tex. 797.

¹⁴Rev. Stat. art. 1200.

¹⁵Bartlett v. Cocke, 15 Tex. 471; Hatchett v. Conner, 30 Tex. 104.

¹⁶Cannon v. Hemphill, 7 Tex. 184.

¹⁷Turnley v. Texas Banking & Ins. Co. 54 Tex. 451.

same,¹⁸ or enjoin another from collecting or disposing of her notes,¹⁹ or for damages accruing to her by reason of injuries received while sole,²⁰ or for the recovery of damages for the seizure of exempt property;²¹ in which latter case it seems the wife is not an improper party plaintiff although the exempt property be community property. And upon the death of the husband pending the suit, she may prosecute the suit alone without making the children of the deceased parties.²²

That the husband is separated from, and not living with, his wife, does not render him for that reason alone an improper party plaintiff, should he be joined as such.²³ He may join her cause of action with his own against the same defendants, and growing out of the same transaction, and recover in his own right and in the capacity of her representative in the same suit.²⁴ And, being authorized to sue alone, he may appeal alone for her, from an adverse decision against himself and wife.²⁵

§ 287. Actions Concerning Community Property.

We come now to consider actions concerning another class of property in which the wife has an interest, equal in point of ownership to that of her husband,—the community estate of herself and husband. We have seen that, although the husband is authorized to sue for and recover the wife's separate property, if he fails or refuses to do so, she can sue in her own name. But it is not so with reference to their community property. The husband during coverture is the sole custodian and manager of that estate; he alone can convey it; he is the only person au-

¹⁸*Lee v. Turner*, 71 Tex. 264, 9 S. W. 149; *Texas & P. R. Co. v. Medaris*, 64 Tex. 92; *San Antonio Street R. Co. v. Helm*, 64 Tex. 147; *San Antonio & A. P. R. Co. v. Flato*, 13 Tex. Civ. App. 214, 35 S. W. 859.

¹⁹*Clay v. Power*, 24 Tex. 304.

²⁰*San Antonio & A. P. R. Co. v. Corley* (Tex. Civ. App.) 26 S. W. 903, S. C. 87 Tex. 432, 29 S. W. 231.

²¹*Craddock v. Goodwin*, 54 Tex. 578; *Cunningham v. Coyle*, 2 Tex. App. Civ. Cas. (Willson) § 422.

²²*Steel v. Metcalf*, 4 Tex. Civ. App. 313, 23 S. W. 474.

²³*Reddin v. Smith*, 65 Tex. 26.

²⁴*Missouri, K. & T. R. Co. v. Starr*, 22 Tex. Civ. App. 353, 55 S. W. 393.

²⁵*Corley v. Renz* (Tex. Civ. App.) 24 S. W. 935.

wife is permitted to maintain the suit.³³ Being authorized to conduct the litigation of the community, the husband has authority to manage it as he pleases, so long as he does not act in bad faith towards the wife; he may thus make compromise, remit a portion of a recovery,³⁴ or do anything else in connection with such litigation that he considers to the best interests of the community. Upon this principle,—that the conduct of the husband binds the community,—where his own act, culpability, or negligence has occasioned the injury, no recovery can be had. His negligence is even imputable to the wife.³⁵ While the wife may not prosecute a suit for the community, yet a notice given by her to a telegraph company of a claim for damages in favor of the community will be sufficient to support a suit by the husband for such damages.³⁶ This is only an act looking to the protection of the community, and is not in any sense a suit. While in suits by or against the husband concerning the community property the wife is not in the strict sense a party, yet she has such interest in the results as will preclude her from testifying as to transactions with a deceased person, where, under the statute, her husband could not testify.³⁷

§ 288. — by Parent for Injuries Resulting in Death of Child; Statute.

A question not so easy of solution is presented in the cases of actions by a parent for damages for injuries resulting in the death of her child, under our statute authorizing recovery in certain cases. It is provided that “the action shall be for the

Teleg. Co. v. Hoffman, 80 Tex. 420, 15 S. W. 1048; *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407; *Hale v. Bonner*, 82 Tex. 33, 14 L. R. A. 336, 17 S. W. 605; *Campbell v. Harris*, 4 Tex. Civ. App. 636, 23 S. W. 35; *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830.

³³*Texas & P. R. Co. v. Watkins* (Tex. Civ. App.) 26 S. W. 760, S. C. 88 Tex. 20, 29 S. W. 232; *St. Louis S. W. R. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741.

³⁴*Travis County v. Trogon* (Tex. Civ. App.) 29 S. W. 405.

³⁵*Missouri P. R. Co. v. White*, 80 Tex. 202, 15 S. W. 808; Compare *Galveston, H. & S. A. R. v. Kutac*, 76 Tex. 473, 13 S. W. 327.

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sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused;" and that "the action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all."³⁸ Here we have a specific statutory authorization for all the parties entitled to a recovery in such case to join in a suit for such recovery, and the same authorization of any one of the parties named to bring the suit for the benefit of all. Parents are included among those authorized to sue. No distinction is made in favor of the father over the mother in the matter of bringing suit, but either may sue. Such damages are said by some of the authorities to be community property, and it may be contended that the act only meant to permit the wife to sue in such cases, according to the rules regulating her suits generally, and not to confer any special right to sue in these cases. That is answered by saying that there are no provisions for the wife's suing for the community property, either alone or jointly with her husband. To say that this was the meaning of the act would be to nullify that portion authorizing the wife to sue, for to require her husband to sue for her, or even to join her in such case, is not to permit her to sue for the benefit of all. This idea is further refuted by the express terms of article 1199 of the statute, which provides that the "parties entitled thereto may bring their suit for such damages." Now it has been held that the father and mother may join in an action of this sort, for the injuries resulting in the death of their child;³⁹ thus recognizing that the statute has wrought a change in the matter of parties plaintiff for the recovery of this particular community property, if such be community property; for without the aid of this statute the wife is neither a necessary nor a proper party for such recovery. It follows, then, that the evident purpose of the legislature was to confer upon each of the parties named a right of action, provided such action be brought for all those who might, under the statute, be entitled to a recovery,—that one suit should suffice for all. It must be admitted that there are

³⁸Rev. Stat. arts. 3021, 3022.

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expressions in the statute which go far toward indicating that the damages to the extent that either parent may be injured would be separate property. Witness the provision that "the action shall be for the sole and exclusive benefit of the surviving . . . wife, . . . and parents;" and witness further the subsequent provision that "the jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict."³⁹ And if the question were an open one, the writer would incline to the opinion that this language, coupled with the authority to the wife to sue in her own name, for her own benefit as well as for the benefit of the others, would constitute the recovery her separate property. A recovery for the community is never denominated "for the benefit of the wife." If it be for the community why should the wife be permitted to sue at all? And why is such action in part for her "sole and exclusive benefit," and the jury required to separately estimate and award her damages? But this is a digression. Whether or not the effect of the act is to take out the amount of such damages as the wife may be entitled to recover for the death of her child, from the community, and to constitute it her separate fund, certain it is that it has authorized her to prosecute in her own name such actions, and recover whatever amount she may show herself entitled to, "for her sole and exclusive benefit," without joining her husband with her in the suit or accounting for his nonjoinder, provided she sues also for the benefit of all entitled to a recovery.⁴⁰

§ 289. — For Penalties and Forfeitures under the Statute.

Similar to the foregoing in many respects are those actions authorized by statute for the recovery of penalties, sometimes denominated "liquidated damages," and the like. Notably those brought under the act regulating the sale of intoxicating

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M. W.—21.

liquors, requiring dealers to enter into bond, and authorizing a recovery upon such bond by any person aggrieved by a violation of its provisions.⁴¹ Among other things, the article in question provides, as one of the conditions of the bond required of the dealer, that he will not sell intoxicating liquor "to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business;" and further provides that said "bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such person shall be entitled to recover the sum of \$500 as liquidated damages for each infraction of the conditions of such bond." The expression "any person aggrieved" has been held sufficiently intelligent not to render the act uncertain,⁴² and that the legislature intended only by the use of such words to designate the persons entitled to recover, and not to indicate that such persons could recover only in the event they proved that they were actually aggrieved by such violation.⁴³ It is quite too clear for argument that the wife and mother are parties intended to be protected by the act, and who may be "aggrieved" by a violation of the terms of such bonds. And where the person aggrieved may be a married woman, by the very letter of the statute, as well as its spirit, she is authorized to sue. The case of *Wartelsky v. McGee*, 10 Tex. Civ. App. 220, 30 S. W. Rep. 69, decides that a wife joined by her husband *pro forma* cannot maintain a suit to recover the penalty provided for a violation of the bond with respect to a sale of liquor to her minor child, upon the ground that such recovery is for the benefit of the community, and as such should be brought by the husband alone. The court is probably correct in its conclusion that the

⁴¹Rev. Stat. art. 3380.

⁴²*Peavy v. Goss*, 90 Tex. 90, 37 S. W. 317.

⁴³*Qualls v. Sayles*, 18 Tex. Civ.

App. 400, 45 S. W. 839; *Tipton v. Thompson*, 21 Tex. Civ. App. 143, 50 S. W. 641.

damages thus recovered are community, but seems to have paid no heed to the language of the act authorizing suit by any person aggrieved. The authorities cited in that opinion were not decided under the article in question, and have no bearing upon it. The legislature, if we are at all concerned with its motives for enacting such a law, evidently intended, that notwithstanding the damages when recovered might become a part and parcel of the community if recovered by one of the spouses, to place it within the power of each and every person aggrieved by a violation of the terms of such bonds, to sue in his or her own name, and not be dependent in such manner upon the pleasure of another to sue for him or her. And especially with reference to married women, it meant to provide that in the event of a sale to her husband after the notice provided for, or, in the event he was an habitual drunkard, to authorize her individually as the party aggrieved by such sale, to institute suit for the recovery of the statutory penalty, without waiting for him to sue, or even asking him to join in such suit. True it differs from the general rule with reference to suits for the recovery of community property, but it is by force of special statutory leave,—the same authority given the husband to control the community generally. Her special injury in such case is ample reason why the legislature should make her such a concession. Though there were no reasons, it is sufficient that such permission to sue is given her; and it can make no difference whether she be aggrieved by a sale to her drunkard husband, or to him after notice not to sell, or to her minor child, or by such dealer's permitting her minor child to enter and remain in his house or place of business; for in all these cases she is the recipient of a statutory, defined injury, and the beneficiary of the provision authorizing the party aggrieved to sue.⁴⁴ Especially may the wife sue alone, where the sale is to her husband under such circumstances as amount to a breach of the bond, for we have seen⁴⁵ that the recovery would then be her separate property.

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Other acts providing for the recovery of penalties do not contain such enabling provisions. The act authorizing suit against railroad companies for a penalty for refusing to redeem their unused tickets when presented is not so broad. It provides that for such refusal the company "shall forfeit to the holder thereof a sum not less than \$100, nor more than \$500, recoverable in any court of competent jurisdiction."⁴⁶ No special authority is given the holder of such unused ticket or part, to sue for the penalty. The act simply declares a liability, in a fixed amount, in favor of the person holding such ticket, but evidently contemplates that such recovery must be had in the same manner that property of a like character is ordinarily recovered. At least it does not provide differently. If the wife be the person in whose favor the forfeit is made, clearly the same would be community property, and as such recoverable only by the husband, subject only to the exceptions already given, and not necessary to here repeat.

§ 290. Actions Concerning the Homestead.

The wife's homestead rights, whether in separate or community property, are peculiar to herself. The husband may freely dispose of his separate or the community property, not homestead, but he cannot do so where the property is occupied as a home for the family. We have in a former chapter discussed the nature and extent of her rights in the homestead. It would be an idle provision to say the wife should not lose her homestead by the act of the husband without her consent, and then deny her the right to recover it by suit, in the event he did make an attempt to so dispose of it. Her rights in the homestead are akin to her rights in her separate estate; its conveyance is governed by the same rules. If suit for its recovery be necessary, and the husband fails or refuses to bring it, no good reason can be given why the wife may not do so. The case of *Murphy v. Coffey*, 33 Tex. 508, apparently denies this right; but it probably cannot be considered as deciding more than the general doctrine that the wife cannot maintain a suit for the recovery of the community property, to which we readily assent. But it

⁴⁶Rev. Stat. art. 4560d.

does not enter into a consideration of any of the well-recognized exceptions. If it meant to hold pointedly that the wife could not under any circumstances maintain such suit, it is clearly wrong, both upon principle and abundant authority. In the case of *Kelley v. Whitmore*, 41 Tex. 647, it was alleged that the husband was absent from the state, and that he refused to join in the suit of the wife to protect the homestead against a threatened sale. This allegation alone would not authorize the wife to maintain a suit for the recovery of community property other than homestead; it would not put the case within the realm of necessity, if that be required, and would amount to no more than a showing that the husband refused to join in the suit. It shows no desertion nor exceptional reasons why the wife should be permitted to prosecute the action, further than that the husband refuses to sue. This it is thought is sufficient where the wife has a separate property or homestead right to assert.⁴⁷ It has been held that the wife is not an improper party to an action to recover damages for the seizure of property exempt to the "family," which property was not homestead.⁴⁸ Not nearly so good reasons exist for this holding as if the property were homestead. In the case of ordinary exempt property the husband alone can convey; the wife's assent is not necessary to its disposition. She has no rights therein which her husband cannot divest her of. In *Cunningham v. Coyle*, 2 Tex. App. Civ. Cas. (Willson) § 422, it was held that the wife was a proper party plaintiff with her husband in a suit for the recovery of damages for the wrongful seizure of cotton standing upon the homestead. In *Paris & G. N. R. Co. v. Greiner*, 84 Tex. 443, 19 S. W. 564, the wife, joined by her husband, was permitted to recover the community homestead. In *Houston & T. C. R. Co. v. Lackey*, 12 Tex. Civ. App. 229, 33 S. W. 768, the wife, being abandoned by the husband, prosecuted a suit for damages to the community homestead in her own name, but she could have done this even though the property was not homestead. It is unnecessary to add that the husband may, of course, bring and prosecute any suit involving the right of the family to the homestead without the joinder

⁴⁷See *Lytle v. Harris*, 2 Posey Unrep. Cas. (Tex.) 21.

⁴⁸*Craddock v. Goodwin*, 54 Tex. 578.

thorized to bring a suit for its recovery.²⁶ The wife is not ordinarily authorized to bring such suits. It has been permitted in those cases where there was great necessity for it, as where the husband had abandoned her. Here she is recognized as the head of the family, and as such entitled to the custody and control of the property, and can in consequence maintain any suit necessary to reduce that property to possession, or preserve it;²⁷ and under such circumstances while the husband is an unnecessary party, yet there is no error in permitting the joinder of his name with her as a plaintiff, since ordinarily no injury could result thereby to the defendant.²⁸ But ordinarily the wife is neither a necessary nor a proper party to such suit.²⁹ But such joinder is not reversible error unless special injury be shown.³⁰ Mere refusal of the husband to bring the suit will not authorize her to do so,³¹ nor is it every separation of the parties that will confer such authority. If it were so she might then, at will, deprive the husband of his statutory right of control of the community property, and by her own wrongful conduct obtain an advantage she would not otherwise have. Since damages for an injury to the person of either spouse are community property, they may be recovered only upon a suit by the husband,³² except where, by reason of the abandonment of the wife by the husband, or the dissolution of the marriage by his death or a divorce, the

²⁶Murphy v. Coffey, 33 Tex. 508; Jackson v. Cross, 36 Tex. 193; Middlebrook Bros. v. Zapp, 73 Tex. 29, 10 S. W. 732.

²⁷Wright v. Hays, 10 Tex. 130; Cheek v. Bellows, 17 Tex. 613; Fullerton v. Doyle, 18 Tex. 3; Ezell v. Dodson, 60 Tex. 331; Leeds v. Reed (Tex. Civ. App.) 36 S. W. 347; Missouri, K. & T. R. Co. v. Hennesey, 20 Tex. Civ. App. 316, 49 S. W. 917; Bennett v. Gillett (Tex. Civ. App.) 57 S. W. 302.

²⁸Texas & P. R. Co. v. Fuller, 13 Tex. Civ. App. 151, 36 S. W. 319.

²⁹Ezell v. Dodson, 60 Tex. 331; Texas & P. R. Co. v. Gwaltney, 2 Tex. App. Civ. Cas. (Willson) §

684; Gulf, W. T. & P. R. Co. v. Goldman, 8 Tex. Civ. App. 257, 28 S. W. 267; Texas & P. R. Co. v. Pollard, 2 Tex. App. Civ. Cas. (Willson) § 481.

³⁰Texas & P. R. Co. v. Gwaltney, 2 Tex. App. Civ. Cas. (Willson) § 684; San Antonio R. Co. v. Helm, 64 Tex. 147; Johnson v. Erado (Tex. Civ. App.) 50 S. W. 139.

³¹Rice v. Mexican Nat. R. Co. 8 Tex. Civ. App. 130, 27 S. W. 921.

³²Loper v. Western U. Teleg. Co. 70 Tex. 689, 8 S. W. 600; Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 1 L. R. A. 728, 9 S. W. 598; Gulf, C. & S. F. Teleg. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689; Western U.

ife is permitted to maintain the suit.³³ Being authorized to conduct the litigation of the community, the husband has authority to manage it as he pleases, so long as he does not act in bad faith towards the wife; he may thus make compromise, remit a portion of a recovery,³⁴ or do anything else in connection with such litigation that he considers to the best interests of the community. Upon this principle,—that the conduct of the husband binds the community,—where his own act, culpability, or negligence has occasioned the injury, no recovery can be had. His negligence is even imputable to the wife.³⁵ While the wife may not prosecute a suit for the community, yet a notice given by her to a telegraph company of a claim for damages in favor of the community will be sufficient to support a suit by the husband for such damages.³⁶ This is only an act looking to the protection of the community, and is not in any sense a suit. While in suits by or against the husband concerning the community property the wife is not in the strict sense a party, yet she has such interest in the results as will preclude her from testifying as to transactions with a deceased person, where, under the statute, her husband could not testify.³⁷

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A question not so easy of solution is presented in the cases of actions by a parent for damages for injuries resulting in the death of her child, under our statute authorizing recovery in certain cases. It is provided that “the action shall be for the

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sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused;" and that "the action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all."³⁸ Here we have a specific statutory authorization for all the parties entitled to a recovery in such case to join in a suit for such recovery, and the same authorization of any one of the parties named to bring the suit for the benefit of all. Parents are included among those authorized to sue. No distinction is made in favor of the father over the mother in the matter of bringing suit, but either may sue. Such damages are said by some of the authorities to be community property, and it may be contended that the act only meant to permit the wife to sue in such cases, according to the rules regulating her suits generally, and not to confer any special right to sue in these cases. That is answered by saying that there are no provisions for the wife's suing for the community property, either alone or jointly with her husband. To say that this was the meaning of the act would be to nullify that portion authorizing the wife to sue, for to require her husband to sue for her, or even to join her in such case, is not to permit her to sue for the benefit of all. This idea is further refuted by the express terms of article 1199 of the statute, which provides that the "parties entitled thereto may bring their suit for such damages." Now it has been held that the father and mother may join in an action of this sort, for the injuries resulting in the death of their child;³⁹ thus recognizing that the statute has wrought a change in the matter of parties plaintiff for the recovery of this particular community property, if such be community property; for without the aid of this statute the wife is neither a necessary nor a proper party for such recovery. It follows, then, that the evident purpose of the legislature was to confer upon each of the parties named a right of action, provided such action be brought for all those who might, under the statute, be entitled to a recovery,—that one suit should suffice for all. It must be admitted that there are

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Other acts providing for the recovery of penalties do not contain such enabling provisions. The act authorizing suit against railroad companies for a penalty for refusing to redeem their unused tickets when presented is not so broad. It provides that for such refusal the company "shall forfeit to the holder thereof a sum not less than \$100, nor more than \$500, recoverable in any court of competent jurisdiction."⁴⁶ No special authority is given the holder of such unused ticket or part, to sue for the penalty. The act simply declares a liability, in a fixed amount, in favor of the person holding such ticket, but evidently contemplates that such recovery must be had in the same manner that property of a like character is ordinarily recovered. At least it does not provide differently. If the wife be the person in whose favor the forfeit is made, clearly the same would be community property, and as such recoverable only by the husband, subject only to the exceptions already given, and not necessary to here repeat.

§ 290. Actions Concerning the Homestead.

The wife's homestead rights, whether in separate or community property, are peculiar to herself. The husband may freely dispose of his separate or the community property, not homestead, but he cannot do so where the property is occupied as a home for the family. We have in a former chapter discussed the nature and extent of her rights in the homestead. It would be an idle provision to say the wife should not lose her homestead by the act of the husband without her consent, and then deny her the right to recover it by suit, in the event he did make an attempt to so dispose of it. Her rights in the homestead are akin to her rights in her separate estate; its conveyance is governed by the same rules. If suit for its recovery be necessary, and the husband fails or refuses to bring it, no good reason can be given why the wife may not do so. The case of *Murphy v. Coffey*, 33 Tex. 508, apparently denies this right; but it probably cannot be considered as deciding more than the general doctrine that the wife cannot maintain a suit for the recovery of the community property, to which we readily assent. But it

⁴⁶Rev. Stat. art. 4560d.

does not enter into a consideration of any of the well-recognized exceptions. If it meant to hold pointedly that the wife could not under any circumstances maintain such suit, it is clearly wrong, both upon principle and abundant authority. In the case of *Kelley v. Whitmore*, 41 Tex. 647, it was alleged that the husband was absent from the state, and that he refused to join in the suit of the wife to protect the homestead against a threatened sale. This allegation alone would not authorize the wife to maintain a suit for the recovery of community property other than homestead; it would not put the case within the realm of necessity, if that be required, and would amount to no more than a showing that the husband refused to join in the suit. It shows no desertion nor exceptional reasons why the wife should be permitted to prosecute the action, further than that the husband refuses to sue. This it is thought is sufficient where the wife has a separate property or homestead right to assert.⁴⁷ It has been held that the wife is not an improper party to an action to recover damages for the seizure of property exempt to the "family," which property was not homestead.⁴⁸ Not nearly so good reasons exist for this holding as if the property were homestead. In the case of ordinary exempt property the husband alone can convey; the wife's assent is not necessary to its disposition. She has no rights therein which her husband cannot divest her of. In *Cunningham v. Coyle*, 2 Tex. App. Civ. Cas. (Willson) § 422, it was held that the wife was a proper party plaintiff with her husband in a suit for the recovery of damages for the wrongful seizure of cotton standing upon the homestead. In *Paris & G. N. R. Co. v. Greiner*, 84 Tex. 443, 19 S. W. 564, the wife, joined by her husband, was permitted to recover the community homestead. In *Houston & T. C. R. Co. v. Lackey*, 12 Tex. Civ. App. 229, 33 S. W. 768, the wife, being abandoned by the husband, prosecuted a suit for damages to the community homestead in her own name, but she could have done this even though the property was not homestead. It is unnecessary to add that the husband may, of course, bring and prosecute any suit involving the right of the family to the homestead without the joinder

⁴⁷See *Lyttle v. Harris*, 2 Posey Unrep. Cas. (Tex.) 21.

⁴⁸*Craddock v. Goodwin*, 54 Tex. 578.

of the wife if he sees fit. While she is necessarily profited by his success in such suit, she is not, nevertheless, concluded by his failure. The reason why she is bound by the result of his litigation concerning her separate property, and not concerning the homestead, is, that in the former instance the statute constitutes him her agent to represent her in such suits, while it does not do so in the latter.

Again, in most cases where there would be any necessity for the wife's prosecuting the action alone, it would arise from the conduct of the husband in attempting to convey or charge the homestead, and would in consequence be such fraud in law as would of itself authorize her to sue alone, and to further make him a defendant if necessary.⁴⁹

§ 291. Actions for Alienating Husband's Affections.

An unmarried woman may maintain an action for damages against a man for a breach of a promise to marry her, upon the theory that she by such breach has been injured by the loss of the society and support and the interest in his property which the defendant would have brought to her upon a consummation of their agreement to marry. By much stronger reasons can the wife, after marriage, maintain an action against one for damages resulting to her on account of causing an alienation of her husband's affections, and the loss of his society and support, if she be not incapacitated by her coverture.⁵⁰ At common law, on account of the unshakable fiction of marital unity, the right of a married woman to prosecute an action for personal injuries was denied. Under that law a cause of action for such injuries, whether committed before or after her marriage, was hers, but on account of her disability she had no remedy, unless her husband joined in bringing her suit. The right of action was hers, but, owing to the fiction mentioned, she could not assert it. While marriage was an absolute gift to her husband of her goods and chattels, it was only a qualified gift of her choses in action, depending upon the condition that he reduce them to possession

⁴⁹Compare *post*, § 295.

⁵⁰See *Ex parte Warfield* (Tex. Crim. App.) 50 S. W. 933.

during coverture, or otherwise upon his death they belonged to her.⁵¹ And Mr. Bishop also says that on the death of the husband the wife's choses in action, not reduced by him to possession, survive to her. She takes them, not as heir, personal representative, or administratrix, but they revert to her in her own right. And that this doctrine applies as well to postnuptial as to antenuptial choses in action.⁵² So that at common law a married woman had a cause of action against a person who wrongfully alienated her husband's affections, as for any other tort, but by reason of her coverture she could not prosecute such action in her own name. But if the husband died, or there was an absolute divorce, she might then maintain the suit as a *feme sole*. Such was the rule at common law. With us, however, we have seen that damages recoverable for an injury inflicted upon the wife are community property, and that generally the husband, being entitled to the control of that estate, is the only person authorized to maintain a suit for the recovery of such damages. And that his refusal to bring such suit would not authorize the wife to sue in her own name. That there had to be exceptional reasons, such as his abandonment and prolonged absence, and the like, to authorize her to sue. If such damages be community property, the husband's attitude is such that he cannot sue for them. Again, if he has deserted her without fault upon her part he is no longer entitled to the exclusive control of the property that belongs to them in common, but her rights, to say the least, are the equal of his; and it would follow that, though such damages are community property, every reason exists for allowing the wife, when deserted by the husband without fault upon her part, through the wilful interference of another, to maintain an action for her damages in her own name against such person interfering.⁵³ The reasons for requiring the husband's joinder not existing, the rule itself ceases. But it is by no means clear that damages for such an injury would be community property at all. In a general way it is said that damages flowing from an injury to the wife's person or reputation are community. So they are; but where those damages are

⁵¹Bright. Hus. & Wife, 34, 36.

⁵²See *ante*, § 287.

⁵³Bish. Mar. Wom. 171.

produced by the wrongful act of the husband jointly with another, it has been held that they were not community.⁵⁴ The wife has in them a peculiar right as distinguished from her husband; indeed he has no rights in them whatever; certainly none that he can enforce, for he cannot profit by his own wrong. Such damages, then, have the elements of separate property, and if such, the wife can sue for them alone. If under a strict construction of our statutes they are community, the husband is in no position to sue for them, nor justly deny his wife the right to do so, and she ought not, under our liberal rules, to be denied a remedy for injuries so great. The case of *Foot v. Card*, 58 Conn. 1, 6 L. R. A. 829, 18 Atl. 1027, broadly holds that a married woman, independently of any statute, may sue for the alienation and loss of her husband's conjugal affections and society, in her own name, and without joining her husband as coplaintiff; and bases the decision upon the ground that the damages belong solely to the wife. But the weight of authority is against her right, except in those states where there are enabling statutes. With us it is not thought that there should specially be an enabling statute, as the rules of the common law have not been incorporated in our marital system, but their rigor has been greatly relaxed, and they are in many instances directly antagonistic to the well-defined rules of our later marital jurisprudence. In those states which have adopted the common-law marital system enabling statutes are doubtless necessary; in ours the spirit of our system, and the trend of our decisions, foster the most jealous protection of the rights of our married women, and, with few exceptions, present to them an open court for the redress of any injuries they may receive.

§ 292. When Husband is Insane.

To avoid a possible misapprehension of the rule where the husband is insane, it is proper to here notice the provision of the statute in such cases. Upon analogy it would seem that where he is for any reason incapacitated from bringing suit,—as by his desertion of the wife, or imprisonment in a penitentiary,

⁵⁴*Nickerson v. Nickerson*, 65 Tex. 281; *ante*, § 196.

or by his becoming insane,—the wife can maintain suits for the community in her own name. But while it is true in the two cases first stated, it is not in the last. Had the statute not provided differently it doubtless would have been the rule. But our statute makes provision for the appointment of a guardian pending the husband's insanity, and it is incumbent upon the guardian to prosecute and defend suits for his ward.⁵⁵ An insane person is not civilly dead. The husband during his sanity, and his guardian during insanity, is entitled to the control of not only his separate estate, but of the community as well. In cases of abandonment of the wife, and incarceration in the penitentiary,⁵⁶ the law has made no provision for a representative of the husband, and the exigencies of the situation demand that someone act, and none are by law or nature so well adapted to it as the wife. It would, however, be no part of the duty of the guardian of an insane husband to maintain suits in behalf of the wife's separate property. In this respect she could maintain her own suits. But she would have no authority to represent her husband, either as plaintiff or defendant, neither with respect to his property nor the community.⁵⁷ If she undertakes to do so, her acts done in the progress of the suit are not binding upon his estate.⁵⁸ The wife is entitled first to the guardianship of her insane husband, and as guardian may maintain any suit necessary for the preservation of the community or his separate estate. If the wife becomes insane, no appointment as guardian is necessary to enable the husband to sue for her. He has this authority without.

Nor is the wife authorized to sue for the community because of her husband's nonage. He must do so himself, either through his guardian or next friend.⁵⁹

§ 293. Wife as a Defendant.

Wherever the wife may incur a liability, she may, of course,

⁵⁵Texas & P. R. Co. v. Bailey, 83 Tex. 19, 18 S. W. 481.

⁵⁶Davis v. Laning, 85 Tex. 39, 19 S. W. 846.

⁵⁷See *ante*, §§ 31, 103.

⁵⁸Cason v. Laney (Tex. Civ. App.) 27 S. W. 420.

⁵⁹Texas & P. R. Co. v. Alexander, 13 Tex. Civ. App. 313, 35 S. W. 9. See *ante*, § 116.

be sued upon her refusal to respond thereto. We have seen that she may do this in numerous ways, by her contracts as well as by her torts. Her marriage does not absolve her from liability upon pre-existing demands, nor does it preclude her being called upon through the courts to satisfy those demands, or any others arising subsequent to her marriage. As was said of her in her capacity of plaintiff, here, too, she must appear individually; that is, as any other individual. Her husband's appearing and defending is not her defending. She must be distinctly called to answer if her rights are to be determined. By her rights, as here used, are meant those which her husband cannot freely deny her, such as her interest in the homestead, her separate property, and the like. Where she is a proper party defendant to an action, she is brought in by a personal citation as though she were sole. Service upon her husband of citation issued to her is not binding upon her.⁶⁰ It must be delivered to her in person, or served in some other way recognized by law, as by publication in a proper case. It has been held that a citation by publication, and a default judgment based thereon, to a married woman, citing her in her maiden name, would not be binding upon her.⁶¹ She may appear without service of citation, by intervention, or in any of the ways permitted to other litigants.⁶² But her husband cannot do these things for her, unless he is authorized either by law or by her in person. She may be sued in the county where her husband has his domicil,⁶³ for he is a necessary party defendant with her. She may make all contracts and agreements necessary in the prosecution of her defense; for the right to defend carries with it the right to do those things necessary to a proper defense.⁶⁴

§ 294. When She may be Sued.

"The husband and wife shall be jointly sued for all debts contracted by the wife, for necessities furnished herself or chil-

⁶⁰Shelby v. Perrin, 18 Tex. 515.

⁶¹Rev. Stat. art. 1194, § 1.

⁶²Freeman v. Hawkins, 77 Tex. 498, 14 S. W. 364.

⁶³Blagge v. Shaw (Tex. Civ. App.) 41 S. W. 756; Cordray v. Galveston (Tex. Civ. App.) 26 S. W. 245.

⁶⁴Ward v. West (Tenn. Ch. App.) 35 S. W. 563

n, and for all expenses which may have been incurred by the
 ie for the benefit of her separate property."⁶⁵ And they
 all likewise be jointly sued "for all separate debts and de-
 mands against the wife; but in such case no personal judgment
 shall be rendered against the husband."⁶⁶ The husband is re-
 quired to be jointly sued with her, supposing that by reason of
 her disabilities she may need the counsel in her defense, and the
 opportunity is thus afforded her. But he cannot be compelled
 to give her this counsel, and she may not, except at her peril,
 put her cause in his hands. She would not be protected should
 he neglect it. He must be so sued, whether he is liable to a per-
 sonal judgment or not. The validity of the proceeding against
 the wife is not dependent upon his appearing and defending, for
 it is beyond the power of the plaintiff to compel this, and it is
 held in a Tennessee case,⁶⁷ that it is not necessary that the hus-
 band should have been served with citation before proceeding
 to judgment against the wife. But if this be the law she is de-
 voided the very protection which the statutes seek to afford her;
 i. e., that her husband should be actually brought within the ju-
 risdiction of the court along with her that she may have the ben-
 efit of his counsel.⁶⁸ It is only where it is sought to charge the
 wife personally, or to affect her individual right in some way,
 that she is a necessary, or even proper, party. To illustrate:
 the husband and wife shall be jointly sued for necessities con-
 tracted for by the wife for herself and children. Both are lia-
 ble. She cannot be sued, however, except with the husband,
 while he may be sued and his liability established without join-
 ing her in the suit. She is neither a necessary nor proper party
 where it is not sought to charge her nor her property,⁶⁹ but neces-
 sarily is, where either of these ends is sought to be attained.⁷⁰
 It is proper, then, to make her a party with her husband in a suit
 on notes signed by both her and her husband, where it is
 sought to foreclose a vendor's lien upon the land for which the
 notes were given, for a foreclosure is to be had against her as

Rev. Stat. art. 1201.

Ibid. art. 1202.

Carter v. Kaiser (Tenn. Ch.
 Ct.) 48 S. W. 265.

⁶⁵See *post*, § 296.

⁶⁶Walling v. Hannig, 73 Tex. 580,
 11 S. W. 547.

⁶⁷Milburn v. Walker, 11 Tex. 329.

well as against her husband, and to this extent she is affected individually.⁷¹ So, in a suit against the husband upon his notes for land, where the deed of conveyance was made to the wife, if a foreclosure is sought, she must be a party; while she is not liable, except that a foreclosure may be had against her, for this purpose she should be before the court. It determines her individual equity in the property to pay the unpaid purchase money and avoid a foreclosure.⁷²

§ 295. — Concerning the Homestead.

In all actions in any way affecting the wife's homestead interest, in order to bind her she must be made a party defendant. She has rights in the homestead that no other person can assert for her, and upon which, when called in question, she is entitled to a hearing. In all actions, whether of foreclosure or otherwise, affecting the homestead, if it be desired to conclude the wife by the judgment she should be made a party defendant;⁷³ that is to say, if there can possibly be any defense growing out of her homestead rights which she may urge, that would in any way defeat the action, she must be made a party.⁷⁴ It is not thought that she should be a party to every suit concerning property which she may at the time occupy as homestead, unless her plea of homestead could in some way defeat the action.⁷⁵ Thus it is held to be unnecessary to make her a party to a suit to foreclose a tax lien.⁷⁶ It cannot be perceived how it could be required that she be sued with her husband to foreclose a vendor's lien which existed upon the property prior to her homestead rights; or be made a party to a suit in trespass to try title, where the plaintiff's title antedates the use of the property for homestead purposes; except where there may be a question of the validity of the lien in the former case, and of the existence

⁷¹Linn v. Willis, 1 Posey Unrep. Cas. (Tex.) 158.

⁷²Garner v. Butcher, 1 Posey Unrep. Cas. (Tex.) 430.

⁷³Campbell v. Elliott, 52 Tex. 151; Thompson v. Jones, 60 Tex. 94; Mexia v. Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016.

⁷⁴Jergens v. Schiele, 61 Tex. 255.

⁷⁵Central Coal & Coke Co. v. Henry (Tex. Civ. App.) 47 S. W. 281.

⁷⁶Bean v. Galveston (Tex. Civ. App.) 43 S. W. 1036; San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496; Collins v. Ferguson, 22 Tex. Civ. App. 552, 56 S. W. 225.

[the facts in the latter. The husband alone can convey the homestead to adjust prior equities, and why is not a suit against him for the same purpose as binding? This is doubtless true, theoretically, but as matter of practice, it is preferable both to the plaintiff and the wife herself that she be joined. For whatever may be the disposition of the matters in an action against the husband only, the wife may at any time litigate her rights by again inquiring into the facts. In other words, if a given state of facts be conceded to be binding upon the husband, and to determine his homestead rights, it is not for that reason binding upon the wife, for as against her the facts have not been established. The husband and wife are not in law nor in fact one person, and if authority be sought to oust her by writ of possession from property which is in her possession, such process must be directly sought in the usual way, that is, by a proceeding against her individually.

§ 296. Husband a Necessary Defendant with Her.

In all suits against the wife, the law requires that the husband be sued with her; whether in an action where he is individually liable or not. This rests upon the same reasons that require him to join in her conveyances. The law presumes that the husband's advice and assistance in the preparation and prosecution of her defense will be helpful to her, and to that end requires that he have notice of all demands against her. It is not for the purpose of obtaining relief against him individually, for this is not permitted in demands against the wife, but as a means of protection to the wife, and to the community estate of which he is custodian, and out of which any judgment against the wife is liable to be collected.⁷⁷ Where suit has been instituted against a woman while sole, and pending such suit she marries, upon suggestion of such fact being "entered on the record, in open court, or upon a petition representing that fact being filed with the clerk, it shall be his duty to issue a scire facias to the husband of such defendant, and upon the return

⁷⁷See Rev. Stat. arts. 1201, 1202: Steinback v. Weill, 1 Tex. App. Civ. Carothers v. McNese, 43 Tex. 221: Cas. (White & W.) § 935. Taylor v. Murphy, 50 Tex. 291;

thereof executed the husband shall be made a party to such suit, and it shall proceed as if such husband and wife had originally been defendants in such suit."⁷⁸ The husband should not only be sued along with his wife, but he should remain a party with her to the end of the suit. The plaintiff cannot dismiss as to him and proceed against the wife, for then the husband is no longer sued with her.⁷⁹ It is not the privilege of the plaintiff, but the right of the wife, that he should be sued with her.

In those cases where the wife has been abandoned by the husband, and he is beyond the jurisdiction of the court, and where she has in consequence contracted debts for which she is liable personally, it would be a great miscarriage of justice to deny that she could be sued alone. If the husband has property within the jurisdiction of the court, he may, of course, be sued by seizure of such property, but otherwise he could not be sued; and if in all cases, without exception, he must be a party defendant with her, then it would result in many instances that she could not be sued at all, and would present the anomaly of her being able to make a valid contract, but one that could not be enforced against her. Again, if in such case the wife's debt be one for which the husband is not personally liable, as her antenuptial debt, then it would follow that the wife could not be sued upon her debt though never so just, merely because the court could obtain no jurisdiction over the person of the husband. This would be an injustice to the wife as well as to her creditors. The same reasons that exist for permitting her to contract under such circumstances exist for permitting a suit to be maintained against her alone upon such contracts, or any others that are properly enforceable against her. No court will require an impossibility, and where the husband cannot for any reason be sued with the wife she may be sued alone. The line of decisions permitting the wife under such circumstances to control, and contract with reference to, and even convey, the community property, supports the views here expressed.⁸⁰ Neither would the

⁷⁸Rev. Stat. art. 1253.

⁷⁹Taylor v. Bonnett, 38 Tex. 521.

⁸⁰Cullers v. James, 66 Tex. 494, 1 S. W. 314; Woodson v. Massenberg,

3 Tex. Civ. App. 146, 22 S. W. 106.

See also Fermier v. Brannon, 21

Tex. Civ. App. 543, 53 S. W. 699; ante, §§ 31, 105, 67.

purposes of the statute be subserved by a suit against the husband supported by a citation by publication, if the suit against him be a merely formal one and not intended to affect his rights, for the statute is evidently intended to apply only in cases where the husband is actually fulfilling the duties of a husband as the head of the family, and thus entitled to notice of suits against his wife. If he has deserted her, or is incarcerated in a penitentiary, or insane, then she may not only make contracts, but may be sued as a *feme sole*. With these exceptions, if we are correct in our reasoning, the husband should always be sued with the wife, to the end that she may have his counsel, and that her rights will be protected by the person to whom the law intrusts those rights generally. If the husband and wife reside in different jurisdictions within the state, suit may be brought in the county where either of them resides, where both are proper parties.⁸¹

Another instance may arise, where in the nature of things the husband cannot be a defendant with his wife; it is in those cases where he may sue her, if such be permitted under our system. We have seen that the wife may sue the husband,⁸² thus recognizing their separate identity as proper juristic persons, and we have seen further that marriage in no way discharges antenuptial mutual liabilities between the spouses;⁸³ and that within certain bounds husband and wife may contract with each other, and it would seem to follow that there might arise a case where the husband would be permitted to sue his wife.

§ 297. She is Not a Necessary Defendant, When.

From what has already been said, it will be seen that where the wife can have no interest in the litigation, as in an action against the husband upon an individual demand, or concerning his separate property, she need not be sued. So in reference to the community estate of herself and husband, unless she is asserting some right beyond the ordinary community interest, she need not be a party. The husband alone controls that, and an action against him individually concerning it will determine the

⁸¹Fermier v. Brannan, 21 Tex. Civ. pp. 543, 53 S. W. 699.

⁸²Ante, § 283.

⁸³Ante, § 49.

wife's rights therein. If her name appears upon the contract with her husband's, yet, it not further being made to appear that the contract was such as she might lawfully make, she is not a necessary party defendant to a suit thereupon.⁸⁴

⁸⁴Burke v. Purifoy, 21 Tex. Civ. App. 202, 50 S. W. 1089.

CHAPTER XX.

PLEADINGS.

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|---|---|
| § 298. Wife must Allege Grounds Entitling Her to Sue. | § 300. Facts Showing Her Liability must be Plead. |
| § 299. Actions by Husband in Behalf of Wife. | § 301. Coverture as a Defense. |

§ 298. Wife must Allege Grounds Entitling Her to Sue.

The rule being that the husband must appear as plaintiff in the wife's suits, whenever she undertakes to prosecute in her own name she must by her pleadings bring herself within one of the recognized exceptions, authorizing her to so prosecute, as if it be an action to recover her separate property, that her husband fails or refuses to sue for her or to join with her in her suit.¹ And the fact that a divorce suit is pending between her and her husband cannot make any difference.² It is not a fatal error to the maintenance of her suit that such allegations are not contained in her original pleadings; they may be supplied by amendment;³ and the pleadings showing her to be the real party plaintiff, her further allegation that she is doing business in a certain trade name may be stricken out as surplusage.⁴ Not only must the facts authorizing suit by her alone be alleged, but the petition must allege facts which show the action to be one which the wife may maintain. As if it be for the recovery of her separate property, she must allege facts from which it will appear that the property sought to be recovered is her sep-

¹McIntire v. Chappell, 2 Tex. 378.

²Mitchell v. Wright, 4 Tex. 283.

³Jacobs v. Cunningham, 32 Tex.

⁴Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 Tex. Civ. App.

114, 53 S. W. 834.

arate property. But this does not require her to plead the facts constituting the evidence of her ownership.⁵ It is not sufficient to allege in a general way that she had purchased the property sued for, and was the legal and equitable owner of the same, as these allegations are mere conclusions, and might indicate that the property was presumptively community.⁶ An allegation that the land was her separate property, having been paid for with her money, and that her husband had no interest therein, sufficiently shows that the property sued for is separate, in an action by a married woman to enjoin the sale of land under an execution against her husband.⁷ And in this particular character of action, the petition must further show that her title is really jeopardized by the threatened sale: that if the sale were consummated an innocent purchaser might acquire a valid title to her property by reason of the title standing in the community, else she has shown no cause for the interposition of a court of equity.⁸ If abandonment be relied upon as a ground for maintaining her suit, she must specifically allege the facts of the abandonment to show her right.⁹ It has been held sufficient to allege "that plaintiff had never been divorced from her said husband, but from whom she has been living separate and apart for a long time, to wit, more than two years before this suit was brought; and that about two years ago the said . . . [husband] abandoned plaintiff, and had lived away from her ever since, and is not now a resident of" the county where suit is brought;¹⁰ or, that she and her husband had not lived together for five years, and that he had abandoned her, and that he refused to join her in the suit.¹¹ The allegation, to support proper proof, should show something more than a temporary absence, for this will not authorize her suit. It must, as has been seen, be such absence or abandonment as amounts to desertion.

⁵Rains v. Herring, 68 Tex. 473, 5 S. W. 369.

⁶Schwulst v. Neely (Tex. Civ. App.) 50 S. W. 608.

⁷Cabell v. Menczer (Tex. Civ. App.) 35 S. W. 206.

⁸Purinton v. Davis, 66 Tex. 455, 1 S. W. 343.

⁹Rosenbaum v. Harloe, 1 Tex. App. Civ. Cas. (White & W.) § 849.

¹⁰San Antonio & A. P. R. Co. v. Gillum (Tex. Civ. App.) 30 S. W. 697, S. C. 31 S. W. 356.

¹¹Houston & T. C. R. Co. v. Lackey, 12 Tex. Civ. App. 229, 33 S. W. 768.

anything short of this will warrant her suit, it would only be a case where the husband's unusually prolonged absence rendered it necessary that the wife should resort to the community property for a support; in a case like this it can hardly be doubted that she may sue. The community property is mentioned in this connection, for there can be no question if the property were hers individually; the mere failure of the husband would authorize her suit. If the suit be such as the husband alone is ordinarily authorized to bring,—say for the benefit of the community,—and there exist facts which in any way incapacitate him and render her capable of suing, these facts should, of course, be alleged by her. Thus; that the action is to recover for a tort inflicted by another, in which wrong the husband participated; or that a recovery of property is sought where the husband has disposed of the same for the purpose of defrauding the wife; or that the action is against the husband. Should the wife in her petition fail to make such proper allegations, showing her authority to sue alone, it would be improper to direct a verdict for the defendant upon the coming in of the proof, but a judgment of dismissal only should be entered.¹²

With respect to the wife's power to maintain suits concerning the community, there are two views expressed. The first is that where the husband deserts the wife and ceases to exercise the functions of head of the family, the wife's rights, hitherto passive, at once become active, and she is authorized to immediately contract and sue with reference to the same. The other, that, in addition to the desertion, there must exist a necessity for her thus resorting to the community. While many of the decisions speak of the necessity prompting the wife's suits under such circumstances, they doubtless refer only to the exigencies of the situation as requiring the wife to sue in place of the husband, who is no longer in fact the head and manager of the family, and do not intend to hold that the wife under such circumstances must first have exhausted her separate estate before resorting to the community. This extreme view would have very little to com-

¹²Bennett v. Gillett (Tex. Civ. App.) 57 S. W. 302. (See this case holding that an allegation that

plaintiff is a *feme sole* is supported by proof of desertion by her husband).

mend it. The better reason exists for saying that when the wife has alleged and proved an inexcusable desertion by her husband she is then fully authorized to exercise the rights of a co-owner in such property, and to the extent of suing therefor if necessary.¹³

It is not amiss for the pleader, having stated the grounds authorizing the suit, to crave permission of the court to prosecute the action, though it is held that express authority need not be given.¹⁴

§ 299. Actions by Husband in Behalf of Wife.

Where suit is brought for the exclusive benefit of the wife, the issue is restricted to her rights alone. The joinder of the husband or his prosecuting the suit alone is not for the purpose of asserting his individual rights in the subject-matter of the controversy, and such will not be permitted. He recovers, if at all, upon the strength of his allegations of the wife's rights, and not his own.¹⁵ So if, after alleging the subject-matter of the suit to belong to his wife, the proof shows it to belong to him, or to the community, no recovery can be had by him.¹⁶ It is a fatal variance between the *allegata* and *probata*. A defendant might be prepared to defend against the asserted rights of the wife, but wholly unexpected and unprepared to contest the rights of any other person.¹⁷ And *vice versa*, where the husband sues in his own right, and the proof develops that the subject-matter of the controversy belongs to the wife, there are no proper allegations authorizing him to recover at all. His recovery would be permitted only upon his suing in a proper capacity, that of representative of his wife,¹⁸ and in such a case the husband's ineffectual efforts to recover in his own name would not preclude his recovery subsequently in behalf of his wife; the plaintiff in both cases being the same person, it is true, but not suing in the same

¹³Houston & T. C. R. Co. v. Lackey, 12 Tex. Civ. App. 229, 33 S. W. 768.

¹⁴McIntire v. Chappell, 2 Tex. 378.

¹⁵Houston v. Schrimpf, 31 Tex. 667.

¹⁶Holloway v. Holloway, 30 Tex. 164; Houston & T. C. R. Co. v. Red

Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834.

¹⁷Owen v. Tankersley, 12 Tex. 405; Hatchett v. Conner, 30 Tex. 104.

¹⁸Galveston, H. & S. A. R. Co. v. Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647.

capacity, nor for the same person.¹⁹ It is not a misjoinder of causes of action for the husband to seek damages for injuries suffered by himself and his wife growing out of the failure to deliver a telegraphic message, where the petition alleged that the message was delivered to the defendant company for the benefit of both;²⁰ the petition in such case showing that the recovery was for the benefit of the community estate, the allegations concerning the suffering of the wife, as well as the husband, were only statements of the different elements of the damages to that estate, for which the husband alone was authorized to sue. In such case he does not sue in his own behalf for redress of his personal injuries, and in behalf of his wife for hers, but in the same behalf,—that of the community,—for both. The case of *Austin v. Emanuel*, 74 Tex. 621, 12 S. W. 318, does not assert a contrary rule of pleading to that indicated in this section. That was an action by the husband to recover damages for the loss of certain named articles alleged to belong to him, and to have been in his possession at the time of their destruction by defendant, as set out in an itemized exhibit; the exhibit contained an item of “\$269, money of Mrs. Fannie Emanuel,” plaintiff’s wife. The proof, however, showed that “the money was in fact the property of plaintiff.” The court, after upholding the husband’s right to recover the item, unnecessarily used the following language: “But if the evidence had shown conclusively that the money was the separate property of the wife, the husband had the right, and it was his duty, to sue for it, either alone or jointly with his wife;” certainly a correct proposition of law, but as certainly not applicable to the state of case shown by the facts.

§ 300. Facts Showing Her Liability must be Pleaded.

Before a judgment can be taken against a married woman it must appear by appropriate pleading that the liability is such an one as may properly be enforced against her; that is, that it grows out of one of the special classes of contracts which she is

¹⁹*San Antonio & A. P. R. Co. v. Lato*, 13 Tex. Civ. App. 214, 35 S. C. 859.

²⁰*Southwestern Teleg. & Teleph. Co. v. Dale* (Tex. Civ. App.) 27 S. W. 1059.

by law authorized to make, her antenuptial debts, tort, or that she is in some other way liable to such suit, as that she is claiming an interest or rights in the subject-matter of the controversy, and the like. A petition which fails to so show the grounds of her liability will not support a judgment, either by default or upon proof, the fact of her coverture appearing in such pleading.²¹ If the action be to recover upon her contract for necessities appropriate allegations should show that the necessities were for the benefit of "herself and children,"²² and, upon an exception to its omission, that the debt so contracted was "reasonable and proper," since that is the requirement of the statute authorizing execution against her upon such contracts.²³ But it is not necessary, where in such an action the petition alleges that the note sued on was executed by her for money and means by her had for the proper and necessary care of her children and separate property, to further allege that the children were minors, or that the debt was contracted by her or her authority, or that the husband was insolvent, and that there was no community estate liable for the debt.²⁴ In *Cleveland v. Spencer* (Tex. Civ. App.) 50 S. W. 405, the plaintiff sued E. T. Spencer and her husband H. A. Spencer as partners in the firm name of E. T. Spencer, it appearing from such pleadings that the parties were husband and wife; at the institution of the action an attachment was also issued directing the officer to levy upon the property of the firm of E. T. Spencer, and a writ of garnishment based thereon was also taken out requiring the garnishee to answer as to debts or effects of E. T. Spencer. Upon motion the attachment and garnishment writs were quashed, since the pleadings of plaintiff showed that there was not, and could not have been, such a firm composed of husband and wife, and the writ of attachment could have been levied upon the firm

²¹Trimble v. Miller, 24 Tex. 214; Farr v. Wright, 27 Tex. 96; Covington v. Burleson, 28 Tex. 368; Menard v. Sydnor, 29 Tex. 257; Rhodes v. Gibbs, 39 Tex. 432.

²²Searcy v. Mealler, 1 Tex. App. Civ. Cas. (White & W.) § 929.

²³Rev. Stat. art. 2971; Harris v. Williams, 44 Tex. 124; Rosenbaum

v. Harloe, 1 Tex. App. Civ. Cas. (White & W.) § 850; Kelley v. Embree, 1 Tex. App. Civ. Cas. (White & W.) § 192.

²⁴Hawkes v. Robertson (Tex. Civ. App.) 40 S. W. 548; Cleveland v. Spencer (Tex. Civ. App.) 50 S. W. 405.

property only, and the writ of garnishment inquired concerning the debts or effects of the wife only, against whom no cause of action had been shown.

Of course where the object is not to establish against her a money demand, but to determine her rights in the matter in controversy only, the reason for these requirements does not exist with such cogency. It is sufficient, then, that she be called to answer in a general way in such manner as to apprise her, as any other defendant, of the character of relief sought. It stands to reason, too, that in those cases where the wife cannot be sued without joining the husband,²⁵ the pleading of the plaintiff should declare that she is by reason of her husband's desertion, absence, insanity, or the like, acting as a *feme sole*; otherwise, it might appear that she was not authorized to contract the liability sued on, and, if she was, that she was not subject to be sued except with her husband.

§ 301. Coverture as a Defense.

Coverture is a defense to be pleaded by the defendant herself, where it does not otherwise appear to the court. In those cases where the pleadings of the plaintiff show affirmatively such fact, the courts will interfere to protect her in this respect, and not permit judgments against her except in those cases where they are authorized by law. But the matter must in some way be called to the attention of the court by appropriate pleadings before judgment. It comes too late for a married woman to set up her coverture for the first time in a motion in arrest of judgment.²⁶ And where one is sued as a *feme sole* without joining her husband, and she answers, joining issue without pleading her coverture, she cannot do so after judgment, by an assignment of error;²⁷ for it is not error to render judgment against a married woman in any case where she is properly before the court, and no allegation or proof of her coverture is tendered, if she is otherwise liable.²⁸

The wife, too, like other litigants, is required to plead all the

²⁵*Ante*, § 296.

²⁶*Phelps v. Brackett*, 24 Tex. 236.

²⁷*Caldwell v. Brown*, 43 Tex. 216.

²⁸*Focke v. Sterling*, 18 Tex. Civ.

App. 8, 44 S. W. 611.

facts necessary to her defense. If the plaintiff's case is one apparently good against her, such facts as she relies upon to defeat it, whether payment, limitations, estoppel, fraud, coverture to defeat plea of limitations, *non est factum*,²⁹ or other, must be pleaded by her.

²⁹Lee v. Crosby, 1 Tex. App. Civ. Cas. (White & W.) § 141.

CHAPTER XXI.

EVIDENCE; WIFE AS WITNESS.

§ 302. When Common-Law Rule Obtained.

§ 303. Present Rule; Statute.

§ 304. — Transactions with Deceased Spouse.

§ 305. In Criminal Cases.

§ 306. — Parties Not Lawfully Married.

§ 307. Declarations of Husband and Wife.

§ 302. When Common-Law Rule Obtained.

We have, since the act of 1836, been governed by the rules of the common law of England in matters of evidence, except where other rules are specifically prescribed. Under that law it is well known that the husband and wife were not competent witnesses in any cause, civil or criminal, in which either was a party. The rule was supposed to be founded partly upon the legal identity of the husband and wife, and partly on principles of public policy. It was thought that to permit them to testify unreservedly for or against each other would be to break down the sanctities of that most sacred relation. Whatever came to the knowledge of either while married was supposed to be confidential, and therefore privileged. It made no difference when the relation began, or when it terminated. The rule had its exceptions, but they were closely guarded. The wife could not testify against the husband, even with his consent; it being considered that the public had an interest in the enforcement of the exclusionary rule, as well as the husband. The wife might testify where her own safety or protection demanded it. This rule with unabated vigor was enforced with us until the adoption of the Revised Statutes in 1879.¹ The act of 1871, removing the disqualification of parties to suits to testify therein, was held not

¹See *Jones v. Norton*, 10 Tex. 120;
McKay v. Treadwell, 8 Tex. 176.

to authorize the testimony of husband or wife for or against each other, as the exclusion was not upon the ground of interest only, but of public policy as well;² but, of course, did permit them to testify in their own suits in their own behalf.³ The rule as applied by our courts did not go to the extent of denying the wife the right to testify in a suit against a third party, as to the fraudulent acts of her husband,⁴ nor did it apply to cases in which the husband was offered as a witness in a suit by himself to recover the separate property of the wife.⁵

§ 303. Present Rule; Statute.

For nearly half a century no husband or wife was permitted to testify for or against the other in our courts. The wisdom born of experience has taught us the folly of such a rule, and since the adoption of the Revised Statutes of 1879 the husband or wife of a party to a suit, or who is interested in the issue to be tried, has been permitted to testify therein, except as to confidential communications between such husband and wife.⁶ Upon the most weighty reasons, a limited exclusionary rule is to be desired. That confidence which ought at all times to exist between those bearing this sacred relation ought not to be destroyed, or even impaired, by permitting disclosure of those things which ought in such cases to remain sacred. The language of the act makes incompetent the testimony of either husband or wife when its admission would be to disclose matter that is a confidential communication. It makes them competent witnesses for and against each other generally, but with the exception noted. As to what is, and what is not, confidential, depends upon the facts of each particular case. No definite rule can be laid down, with any assurance of its being at all applicable to all cases alike. Whatever can fairly be considered as having been communicated by one to the other because of their relation as husband and wife ought not to be elicited as testi-

²Gee v. Scott, 48 Tex. 510; Kaufman v. Alexander, 2 Posey Unrep. Cas. (Tex.) 532.

³Cairrell v. Higgs, 1 Posey Unrep. Cas. (Tex.) 56.

⁴Edwards v. Dismukes, 53 Tex. 605.

⁵Turnley v. Texas Banking & Ins. Co. 54 Tex. 451.

⁶Rev. Stat. art. 2301.

mony. The subject-matter of the communication, and the circumstances surrounding it, are proper to be taken into consideration in determining this.⁷ The communication may be written or oral. The death of one of the spouses does not license the communication, nor can the privilege be waived by the survivor.⁸ Separation and divorce can no more license it than death. Either party may testify to matters that came to him from outside information, although it came also as confidential. Or, if the disclosure be made in the presence of another, that other may testify, notwithstanding the communication was intended to be confidential and privileged. But if the communication be in the presence of one incapable of understanding it, it is not for that reason alone not privileged. Of course, a wife, like any other witness, cannot be asked a question the answer to which might tend to degrade her,—as whether she had given birth to an illegitimate child during wedlock.⁹

§ 304. — Transactions with Deceased Spouse.

The rule forbidding either party to a suit by or against executors, administrators, or guardians to testify as against the others as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, it is declared, “shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent.”¹⁰ This applies to suits by the surviving widow as representative of the community estate of herself and deceased husband, and prevents either herself or the defendant from testifying to transactions with, or statements by, the deceased,¹¹ unless called thereto by the other party;¹² but not to an action by the surviving wife in the capacity of legatee, a legatee not being the “heir or legal representative” of the decedent;¹³ nor to an action by the surviving wife

⁷Phoenix F. & M. Ins. Co. v. Shoemaker, 95 Tenn. 72, 31 S. W. 270.

⁸Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705.

⁹Simon v. State, 31 Tex. Crim. Rep. 186, 20 S. W. 399, 716; Meyer v. State (Tex. Crim. App.) 41 S. W. 632.

¹⁰Rev. Stat. art. 2302.

¹¹Gurley v. Clarkson (Tex. Civ. App.) 30 S. W. 360.

¹²Harrell v. Houston, 66 Tex. 278, 17 S. W. 731.

¹³Newton v. Newton, 77 Tex. 508, 14 S. W. 157; Caffey v. Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738.

in her own right, where the acts and statements of the deceased were as agent only of the wife.¹⁴ Nor does it apply to a surviving wife who is not a party to the suit, where the action is not "by or against the executors, administrators, guardians, heirs, or legal representatives, in which judgment may be rendered for or against them as such," since the terms of the statute will not be extended so as to embrace those not especially mentioned therein, nor to include actions not specifically named.¹⁵ Such surviving wife may testify to the acts and conduct of the deceased husband, so long as such conduct and acts do not come within the meaning of "transactions with" or "statements by" the deceased.¹⁶ But the expressions "transactions with," and "statements by," are very broad and comprehensive. The exclusionary rule does not apply alone to transactions between the proposed witness and the deceased or statements by the deceased to such witness, but to transactions with, and statements to, any person whomsoever.¹⁷ Where the surviving widow is sued with an assignee of property in an action seeking a foreclosure merely, and no personal judgment against the widow or the estate, she is not such a party as to preclude the plaintiff from testifying with respect to statements of the deceased concerning the lien contract.¹⁸

§ 305. In Criminal Cases.

"Neither husband nor wife shall in any case testify as to communications by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offense, and a declaration or communication made by the wife

¹⁴Davis v. Weathered (Tex. Civ. App.) 43 S. W. 21; Harris v. Warlick (Tex. Civ. App.) 42 S. W. 356. App.) 35 S. W. 420. See also Gordon v. McCall, 20 Tex. Civ. App. 283, 48 S. W. 1111.

¹⁵Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56; Mahon v. Barnett (Tex. Civ. App.) 45 S. W. 24. ¹⁷Parks v. Caudle, 58 Tex. 216; Hicks v. Hicks (Tex. Civ. App.) 26 S. W. 227.

¹⁸Kahler v. Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160.

¹⁶Shilling v. Shilling (Tex. Civ.

to the husband, or by the husband to the wife, goes to extenuate or justify an offense for which either is on trial."¹⁹

"The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other."²⁰

Either may testify freely for the other, but when so offered the state cannot extend the examination further than a cross-examination upon the matters elicited upon the direct examination. To go further, is to make him or her a witness against the other spouse, and to violate the restriction of the statute.²¹ And, as at common law, it is immaterial when the marriage relation began; the wife cannot be compelled to testify against her husband, even though the matters about which she may be interrogated occurred prior to her marriage to him.²² Nor does the fact of their separation and living apart remove the restrictions.²³ Where the husband is indicted and tried for committing an abortion upon his wife prior to their marriage, the exception of those "criminal prosecutions for an offense committed by one against the other" will not license the wife to testify against her husband. While the offense may have been committed in such case against the wife as an individual, it was not committed against her as his wife. She was not his wife at the time of the commission of the offense, and hence the case does not fall within the license permitted by the statute.²⁴ Otherwise, of course, if the abortion was committed after marriage.²⁵ Bigamy by

¹⁹C. C. P. art. 774.

²⁰Ibid. art. 775.

²¹Creamer v. State, 34 Tex. 173; Greenwood v. State, 35 Tex. 587; Washington v. State, 17 Tex. App. 197; Johnson v. State, 28 Tex. App. 17, 11 S. W. 667; Bluman v. State, 33 Tex. Crim. Rep. 43, 21 S. W. 1027, S. C. 26 S. W. 75; Hoover v. State, 35 Tex. Crim. Rep. 342, 33 S. W. 337; Jones v. State, 38 Tex. Crim. Rep. 87, 40 S. W. 807, 41 S. W. 638; Hull v. State (Tex. Crim. App.) 47 S. W. 472; Williams v.

State, 40 Tex. Crim. Rep. 565, 51 S. W. 224; Merritt v. State, 39 Tex. Crim. Rep. 70, 45 S. W. 21; Penny v. State (Tex. Crim. App.) 42 S. W. 297.

²²Miller v. State, 37 Tex. Crim. Rep. 575, 40 S. W. 313.

²³Johnson v. State, 27 Tex. App. 135, 11 S. W. 34.

²⁴Miller v. State, 37 Tex. Crim. Rep. 575, 40 S. W. 313.

²⁵Navarro v. State, 24 Tex. App. 378, 6 S. W. 542.

the husband is not an offense against the wife, within the ring of the act, and hence she cannot testify against him on this charge.²⁶ Nor is adultery such an offense. And if the wife is permitted to testify against her husband and his adultery upon such a charge, the error is not cured by the court limiting the effect of the testimony to the case of the female defendant.²⁷ Nor are incest by the husband,²⁸ and slanderous words spoken of the wife,²⁹ such offenses. But the exception has no application to such offenses as are committed by the use of force or violence toward the injured party, such as assault, assault with a deadly weapon, battery, and the like.³⁰ This is not a privilege to be exercised or not by the one called as a witness, as he may see proper. When the case falls within the exception, the injured spouse may be called and compelled to testify. The public has an interest in the prosecution of such cases, whether the injured spouse desires or not, and the state is entitled to the testimony of the witness. It is a competency not to be waived or affected by the desires or fears of the witness.³¹ The rule excludes the testimony of the wife when offered as a witness against one jointly indicted and tried with the husband;³² but where an accomplice is on trial for an offense for which the husband is under indictment as principal, and which indictment is still pending, the wife of the principal is offered as a witness by the state against the accomplice then on trial, her husband having previously testified, her testimony has been admitted; the court in the Code has made no provision regarding a case of this kind. "The doctrine which should prevail under such statutes as ours is that, if the husband, being indicted for the same offense, is a competent witness, his wife is also."³³ If the husband be on trial, the wife can be a witness for, but not against, him. . . . If a codefendant be on trial, the one not on trial may be made

²⁶Boyd v. State, 33 Tex. Crim. Rep. 470, 26 S. W. 1080.

²⁷McLean v. State, 32 Tex. Crim. Rep. 521, 24 S. W. 898.

²⁸Compton v. State, 13 Tex. App. 271.

²⁹Baxter v. State, 34 Tex. Crim. Rep. 516, 31 S. W. 394.

³⁰Overton v. State, 43 Tex. Crim. Rep. 516, 31 S. W. 394.

³¹Dumas v. State, 14 Tex. App. 464; Bramlette v. State, 21 Tex. App. 611, 2 S. W. 765.

³²Dill v. State, 1 Tex. App. 1.

³³Whart. Crim. Ev. 391.

witness by the state; and then the witness's wife is a competent witness also."³⁴ And where one separately indicted for an offense was on trial, and there was an agreement with the state's attorney that the prosecution against the husband for that offense should be dismissed, the wife was permitted to testify against the defendant on trial; the court saying, as a reason for allowing it, that under the record and agreement there was no possibility of the husband's being tried under the pending indictment, as it would be dismissed, and hence the wife could not directly or indirectly be testifying against her husband.³⁵

In a trial for murder the divorced wife of defendant was permitted, over his objections, to detail the dying declarations of her daughter, for whose murder the defendant was on trial. At the time of the dying declarations the husband and wife were not divorced. The court said that since the testimony was not a communication within the statute, and being divorced, she could be offered as a witness against her former husband for the purpose of proving such declaration.³⁶

§ 306. — Parties Not Lawfully Married.

The statute applies only to cases of lawful marriage, and can in no case be extended to include those who are living together in violation of law, notwithstanding they may recognize each other as husband and wife. Such was the rule at common law, and such is the effect of our statute.³⁷ Nor will a court exclude the testimony of the mistress of a defendant upon the ground that the intimate relation existing between them is tantamount to the relation of husband and wife.³⁸ And in a prosecution of the husband for bigamy, while the first wife may not testify against him, the second one may.³⁹

³⁴Bluman v. State, 33 Tex. Crim. Rep. 43, 21 S. W. 1027, S. C. 26 S. W. 75; Dungan v. State, 39 Tex. Crim. Rep. 115, 45 S. W. 19.

³⁵Rios v. State, 39 Tex. Crim. Rep. 675, 47 S. W. 987.

³⁶*Ex parte* Fatheree, 34 Tex.

Crim. Rep. 594, 31 S. W. 403.

³⁷Mann v. State, 44 Tex. 642.

³⁸Sims v. State, 30 Tex. App. 605, 18 S. W. 410.

³⁹State v. Shreve, 137 Mo. 1, 38 S. W. 548.

§ 307. Declarations of Husband and Wife.

No rule differing from that applicable to other litigants can be laid down with reference to the declarations and admissions of the wife, and of the husband as binding the wife. Where she may testify in person, her admissions or declarations against her interest are admissible. Ordinarily she is not bound by the admissions or declarations of her husband with respect to her separate rights, not made in her presence,⁴⁰ nor does the same strictness applicable to others apply to the husband's statements, even when made in her presence. If such statements in disparagement of her rights are effective at all, it is upon the principle of estoppel, and we have seen that before she can be estopped to assert her rights her acts or conduct must have amounted to positive fraud.⁴¹ The law will not require her to speak when to speak would be at the cost of the conjugal peace and happiness. Her silence will not always be construed into acquiescence.

The wife's statements at the time of executing an instrument are admissible in evidence, upon an issue as to whether such instrument was intended as an absolute conveyance or mortgage.⁴²

⁴⁰*La Master v. Dickson*, 91 Tex. 593, 45 S. W. 1; *Evans v. Purinton*, 12 Tex. Civ. App. 158, 34 S. W. 350; *Smith v. Redden*, 1 Posey Unrep. Cas. (Tex.) 360.

⁴¹*Ante*, § 134.

⁴²*Houx v. Blum*, 9 Tex. Civ. App. 588, 29 S. W. 1135.

CHAPTER XXII.

LIMITATIONS.

§ 308. Act of 1841; Constitution of 1869.

§ 309. Amendment of 1895.

§ 310. When and in What Cases the Statute Runs.

§ 311. Extent of Coverture as an Exemption; must be Pleaded.

§ 312. Wife may Claim Benefit of Statute of Limitations.

§ 313. Tacking Disabilities.

§ 314. Husband Pleading Limitation against the Wife.

§ 308. Act of 1841; Constitution of 1869.

“If a person entitled to commence suit for the recovery of real property, or to make any defense founded on the title thereto, be, at the time such title shall first descend, or the adverse possession commence, . . . (2) a married woman, . . . the time during which such disability shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or making of such defense; and such person shall have the same time, after the removal of his disability, that is allowed to others by the provisions of this chapter.”¹ “If a person entitled to bring any action other than those mentioned in chapter 1 of this title be, at the time the cause of action accrues, . . . (2), a married woman, the time of such disability shall not be deemed a portion of the time limited for the commencement of the action, and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.”² The statutes here given, while in the language of the revision of 1879, are substantially the provisions of the earlier acts, and with slight alterations have remained to the

¹Paschal's Dig. arts. 4621-4624;
²Rev. Stat. 1879, art. 3201.

¹Rev. Stat. 1879, art. 3222.

present day, except that the Constitution of 1869³ provided that married women should not be barred of their rights of property by limitation of less than seven years,⁴ and except during the period of time from the 28th day of January, 1861, to the 30th day of March, 1870, when by statute⁵ all laws of limitation were suspended because of the disturbed condition of the country owing to the civil war and period of reconstruction. This suspension of the statute did not, however, have the effect of reviving causes of action that were already barred, as such thing was expressly stipulated against. Its object was merely to prevent the suspended period from being taken into account in the computation of the time required by the statute to bar an action. It did not restore a disability that had already been removed,⁶ nor did it have the effect of permitting one disability to be tacked to another.⁷

§ 309. Amendment of 1895.

According to the amendment of 1895, with respect to actions for the recovery of real property, or defenses founded on the title thereto, it is provided "that limitation shall not begin to run against married women until they arrive at the age of twenty-one years; and further, that their disability shall continue one year from and after the passage of this article, and that they shall have thereafter the same time allowed others by the provisions hereof; and further, that this article shall in no way affect suits that are now, or may be, pending when the same takes effect; and all such suits shall be tried and disposed of under the law now in force."⁸ It will be observed that, in respect to other causes of action, the statute has not been changed, and that the statute does not run against a married woman.⁹

§ 310. When and in What Cases the Statute Runs.

Whenever the cause of action or the defense arises, the statute

³Art. 12, § 14.

⁴French v. Strumberg, 52 Tex. 92; Trammell v. Neal, 1 Posey Unrep. Cas. (Tex.) 51.

⁵Rev. Stat. art. 3366.

⁶Ragsdale v. Barnes, 68 Tex. 504,

5 S. W. 68; Harvey v. Carroll, 5 Tex. Civ. App. 324. 23 S. W. 713.

⁷Brown v. Meador, 1 Posey Unrep. Cas. (Tex.) 281.

⁸Rev. Stat. art. 3352.

⁹Ibid. art. 3373.

limitation begins to run against those not specifically excepted from its provisions. If the person in whose favor the cause of action or defense be, is then a married woman,¹⁰ the statute does not begin to run in causes other than those pertaining to real property, until the death of her husband or the dissolution of the marriage in some other way.¹¹ In actions concerning real property, she has until she is twenty-one years of age, and from and after that time the statute runs. The amendment of 1895, above noticed, while partially removing coverture as a bar to the running of the statute, did not become effective at once, but expressly allowed one year from its passage. So, at present, in actions for the recovery of real property or defenses founded upon the title thereto, coverture is no bar to the running of the statute, except where the married woman is under the age of twenty-one years. From and after the removal of her disability by death of her husband or other dissolution of the marriage in personal actions, and from and after her becoming twenty-one years of age in real actions, she has the same time within which to bring her action, or assert her defense, as other persons. If at the time the statute of limitation was adopted a woman was married, she is not affected by it until the removal of her disability.¹² And again, in order to start the statute against her, the cause of action must be complete prior to her coverture. For whenever the acts leading up to a cause of action had their beginning, clearly if no cause was complete so that she might sue, until after her coverture, the statute would not run against her.¹³ Nor will an adverse possession begun during coverture start the statute against the wife until the removal of the disability.¹⁴

The exemption of married women from the operation of the statute pertains only to property in which they own some estate.

¹⁰Rowles v. Smith (Tex. Civ. App.) 20 S. W. 381; Byne v. Wise (Tex. Civ. App.) 31 S. W. 1069; Tevis v. Miller, 84 Tex. 638, 19 S. W. 801; Wiley v. Renz (Tex. Civ. App.) 24 S. W. 935; Oury v. Saunders, 5 Tex. Civ. App. 310, 24 S. W. 341; Smith v. McElyea, 68 Tex. 70, 3 S. W. 258; Exia v. Lewis, 3 Tex. Civ. App. 113, 20 S. W. 1016; Cunningham v. San

Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

¹¹McDonald v. McGuire, 8 Tex. 361.

¹²Storer v. Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

¹³Hardy v. Dunlap, 7 Tex. Civ. App. 339, 26 S. W. 852.

¹⁴Halbert v. Brown, 9 Tex. Civ. App. 335, 31 S. W. 535.

It cannot be extended so as to include property in which the wife has no interest beyond a community or homestead right or interest. If the title to land claimed as a homestead by the family be in the husband or the community, clearly, in a proper case, limitation would run against the husband, and necessarily bind the wife. The principle is well illustrated in *Smith v. Uzzell*, 61 Tex. 220. It appeared upon the trial of that case that the property in controversy was purchased by one Peel under whom the appellant Smith held, at a sale made under a judgment and execution against Uzzell, the husband, that he received a deed therefor December 3, 1872, which was recorded on the 5th of the same month in the county where the land was situated, and that since January, 1873, the land had been continuously occupied by Peel and the appellant. Peel occupied the land until he sold it to Smith May 12, 1880, and during that time paid the taxes. The suit was filed September 24, 1880, by the widow and minor children of Uzzell, who died in 1878. The appellant Smith, among other things, pleaded limitation of three and five years. The land was the separate property of Uzzell. Limitation ran in the case against the wife; the court through Justice Stayton saying: "Nor do we see how the widow can invoke such a rule. The statutory bar is complete against those holding the fee in the land, and can it be possible that the one who has no estate at all can have a higher right than the owner of the fee could have had he lived; that there is some vitality or magic influence in the fact that land was once the homestead, which gives to a claim of homestead, without an estate to support it, an exemption from the effect of the statute of limitation which the estate in fee does not enjoy, by which the mere claim of right to use as a homestead will be preserved, while adverse possession under the statute divests the only person from whom any estate or shadow of claim can be derived of the only estate upon which all others, or rights, must depend for an existence? Such an interpretation of the statutes, applicable to the subject, would be at war with all the settled canons of construction. . . . When the statutory bar is complete against the owner of land it must be held complete against every one claiming through such per-

n, whatever may be the character of the claim."¹⁵ Nor is the rule different where the property is community of the husband and wife.¹⁶ As applied to land, however, the rule is now largely barren of results since the statute runs against married women over twenty-one years of age, the same as against their husbands. But in other demands in favor of the community, the cause of action being the husband's and not the wife's, the statute runs from the time when he could have sued; and if it be barred as to him, it is also barred as to the wife, notwithstanding her community interest in the property.¹⁷ Thus, notes payable in form to the wife generally are presumptively community property, and as such subject to the running of the statute;¹⁸ but if the note, either upon its face, or by proper pleadings and proof appears to belong to her separately, then it is not subject to the statute.

A cause of action asserted by a married woman as administratrix of an estate of another person is subject to the plea, since it is not a cause of action in her favor, but of the estate which she represents.¹⁹ Her coverture protects her own rights only, and not those of her cotenant in the property.²⁰ If the real estate of a married woman be sold for taxes due a city, she is allowed one year from the removal of her disability within which to redeem the same.²¹

311. Extent of Coverture as an Exemption; must be Pleaded.

Formerly the scope of the exemption of married women from the force of the statutes of limitations was much broader than present. By an act of January 20, 1840,²² it was provided that "if, during coverture, a sale of any of the lands or slaves of the wife be illegally effected, no limitation shall commence

¹⁵Simonton v. Mayblum, 59 Tex. 7; Hussey v. Moser, 70 Tex. 42, 7 S. W. 606; Cuellar v. DeWitt, 5 Tex. Civ. App. 568, 24 S. W. 671; Eldridge v. Hersh, 6 Tex. Civ. App. 35, 25 S. W. 49.

¹⁶Hussey v. Moser, 70 Tex. 42, 7 S. W. 606; Cuellar v. DeWitt, 5 Tex. Civ. App. 568, 24 S. W. 671.

¹⁷Rice v. Mexican Nat. R. Co. 8 Tex. Civ. App. 130, 27 S. W. 921.

¹⁸Wells v. Cockrum, 13 Tex. 127.

¹⁹Taylor v. Bland, 60 Tex. 29.

²⁰Johnson v. Schumacher, 72 Tex. 334, 12 S. W. 207.

²¹Rev. Stat. art. 521.

²²Paschal's Dig. art. 4603.

to run during the coverture, and should the wife survive the dissolution of the marriage, she may sue for and recover such property; should the wife survive the dissolution but not the time allowed by the law of limitations, then the running of such law shall cease till all the children of the deceased mother shall have arrived at the age of majority, or those under that age shall have married, and the heirs of the wife shall have the unexpired time allowed by the law of limitations, within which to institute their suit for the recovery of said property; and if the wife shall not survive the dissolution of the marriage, the laws of limitations shall not commence running, as to the children of the deceased mother, until all the children shall have arrived at the age of majority, or those under that age shall have married." This act was repealed by the adoption of the Revised Statutes of 1879, but is here given as it might have a possible bearing upon the question, since, if the mother did not survive the dissolution of the marriage, limitations did not run against her children until all had arrived at their majority or married, and for the further reason that it, with the other statutes quoted, shows the trend of our legislation upon this subject. It has been held that the repealed article contemplated such a sale as illegally affected the wife's property as an apparently good conveyance, and not one that is void by reason of an insufficient acknowledgment by her.²³

Where one relies upon coverture to take her case out of the statute, such facts must be properly pleaded and proved.²⁴ Proof without such allegation will not be permitted.²⁵ And where it is sought to show that, under the act of the legislature suspending the running of the statutes from January, 1861, to March, 1870, the disability of coverture existed as to one replying to a plea of limitations, at the time the suspension ceased, the burden is upon such person to show coverture at that time.²⁶ Whether the action be by the wife in person or by the husband in her behalf, it is incumbent to plead and prove such exemption

²³Harris v. Wells, 85 Tex. 312, 20 S. W. 68.

²⁴Corley v. Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839.

²⁵Dublin v. Taylor. B. & H. R. Co. (Tex. Civ. App.) 49 S. W. 667.

²⁶McConnico v. Thompson, 19 Tex. Civ. App. 539, 47 S. W. 537.

from the statute. When thus pleaded and proved, however, the statute has no application to her, within the limitations laid down.²⁷ It can make no difference that she and her husband are living apart, or that he has deserted her. It will not do to say that where the husband has deserted her she is in effect a *feme sole*, and can sue in her own right, and for that reason ought not to be protected by the exemption from the running of the statute.²⁸ The same may be said of her concerning her separate property, even when she and her husband are living together; if he fails or refuses to sue, she may do so; yet in neither case does the permission to sue render it obligatory upon her. She is permitted to sue for her separate property at any time upon her husband's failure or refusal; yet no one would think of contending that from the date of her husband's failure or refusal the statute would run against her. That would effectually deny her the exemption altogether, since the husband's failure and the statute would begin when the cause arose. The provision allowing the exemption is not so limited, but broadly denies, during their coverture in personal actions, and their minority in real actions, that the statute of limitations shall apply to them. The exemption being to her as long as she is a married woman, the fact of her being deserted by her husband affords no ground for denying her the benefit of the exemption, and subjecting her to a plea of the statute. In North Carolina, where, under the Code, a *feme covert* may sue for her separate property, it is held that the statutes do not run against her upon her failure to do so.²⁹ Similar holdings are made in Missouri,³⁰ Mississippi,³¹ California,³² Ohio,³³ and probably other states.

Upon parity of reasoning it is thought that limitations will not run against a married woman during her disability, in that class of cases where, by reason of the husband's conflicting interests, or his wrongful or fraudulent conduct, she is authorized

²⁷Harrison v. Sulphur Springs (Tex. Civ. App.) 50 S. W. 1064; Griffin v. Towns (Tex. Civ. App.) 25 S. W. 968.

²⁸Throckmorton v. Pence, 121 Mo. 10, 25 S. W. 843.

²⁹Campbell v. Crater, 95 N. C. 156.

³⁰Smith v. Charter Oak L. Ins. Co. 64 Mo. 330.

³¹North v. James, 61 Miss. 761.

³²Wilson v. Wilson, 36 Cal. 447.

³³Ashley v. Rockwell, 43 Ohio St. 386, 2 N. E. 437.

to sue upon a demand that would otherwise be the husband's suit. Such suits are not expressly authorized by statute, but are permitted by the courts out of the great necessity of the case, and are analogous to her suits when deserted by her husband. That she is thus sometimes permitted to sue furnishes no reason why in such case the plain mandates of the statute exempting her from the force of the statute of limitations should be ignored.³⁴ It may result, then, that actions which are ordinarily maintainable by the husband may become barred against him, but as to the wife, who by force of the special circumstances of the case may sue, are not barred. This is not in conflict with the views expressed in the latter part of the preceding section.³⁵ There the cases stated could be maintained by the husband only; here, by the wife only.

To a plea of laches or stale demand, coverture is generally a sufficient answer, the same as where it is interposed to avoid the statutory bar based on lapse of time. "The cases in which it may be supposed to have been held that the same rule as to disabilities and as to time within which suits must be brought does not exist in equity as at law, must probably mean nothing more than that the lapse of a long time, after cause of action accrues, before suit is brought, is a fact from which inference of want of right may sometimes be drawn, which could not be indulged if suit had been brought promptly, and thus the lapse of time assist to reach the conclusion that the right in fact never did exist, rather than to have intended to hold, in the face of statutes declaring what disabilities shall operate to prevent bar, that any court has power to deny to such statutes their full effect when presented in an equitable proceeding as well as when arising in actions strictly legal in their natures."³⁶

A petition for new trial in a suit by a defendant where judgment has been rendered upon service by publication is such a suit as that plea of limitation may be met by plea of coverture.³⁷

³⁴Alsup v. Jordan, 69 Tex. 300, 6 S. W. 831.

³⁵*Ante*, § 310.

³⁶Hill v. Moore, 85 Tex. 335, 19 S. W. 162; Reed v. West, 47 Tex. 248; Robinson v. Kampmann, 5 Tex. Civ.

App. 605, 24 S. W. 529; Darrow v. Summerhill (Tex. Civ. App.) 58 S. W. 158; Storer v. Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

³⁷Brown v. Brown, 61 Tex. 45.

§ 312. Wife may Claim Benefit of Statute of Limitations.

Like any other defense recognized by law, the wife is entitled to the plea of limitation in actions against her. It is a personal defense to her, and cannot be waived by her husband or anyone else for her, without her consent. The husband has no authority to revive, as against her property, a claim that has become barred by limitations.³⁸ Nor can he, by an acknowledgment and new promise, prevent the running of the statute upon a demand against her. Thus, if she be surety by mortgage upon her property for his debt, he would have no authority to renew his debt without her consent, and thus arrest the running of limitations in her favor. In a suit brought to foreclose a mortgage given by her to secure her husband's debt more than four years after the maturity of such debt, her plea of limitation was sustained, notwithstanding her husband's debt had been kept alive by proceedings in bankruptcy.³⁹ It can make no difference, so far as her right to plead the statute is concerned, whether the demand against her be for a postnuptial or antenuptial debt. A nice question arises as to the power of the wife to renew her promise, and thus keep alive the demand against her. It is held in Vermont that she cannot make such contract of extension during coverture.⁴⁰ With us the test would doubtless be whether the new promise—for it is upon the new promise the action must be brought—is such as she may make under the statute of contracts. I think a legitimate construction of the statute permitting her to contract for necessities will embrace the contract. Her rights—and these the act was intended to protect—would be better served to permit the extension than to deny it, and thereby possibly cause an unseasonable sacrifice of her property. Such extension might be highly advantageous to her interests; someone ought to have the power to make the contract. The husband cannot, but it ought to be held that she can.⁴¹ If the debt be secured by lien upon her property, there would be the further reason for permitting the contract, that it would be for the bene-

³⁸Milburn v. Walker, 11 Tex. 329.

⁴⁰Farrar v. Bessey, 24 Vt. 89.

³⁹Wofford v. Unger, 55 Tex. 480.

⁴¹Beattie v. Keller (Tex. Civ.

See also Washington L. Ins. Co. v.

App.) 49 S. W. 408.

Gooding. 19 Tex. Civ. App. 490, 49

S. W. 123.

fit of her separate estate.⁴² But she cannot make such contract as will arrest the running of the statute in the husband's favor.⁴³

Nor can she, by an acknowledgment and new promise, revive a debt already barred,⁴⁴ for the new promise must be made by a person competent to contract,⁴⁵ and it can hardly be said that an undertaking to satisfy an unenforceable demand is within any class of contracts which a married woman can make.⁴⁶

§ 313. Tacking Disabilities.

When it is remembered the statutes begin running the moment the cause of action accrues, it will be readily seen that at that particular time, if no disability exists, the statute will be operative. And when once begun, no subsequent disability will arrest its running, for a disability arising after the cause of action has accrued is not one existing "at the time the cause of action accrues." For illustration, let us suppose, at the time the cause of action accrues the person in whose favor the cause of action exists is an infant; by the terms of the statute such infant has the same time after the removal of such disability within which to bring the action as is allowed to others not similarly disabled. Now, upon reaching her majority, or marrying,⁴⁷ she is relieved of the disability of infancy, and the statute starts.⁴⁸ It can make no difference that by marriage she is again under disability; it is another disability, and one that will exempt her from the statute as to causes accruing during that disability, but not from those accruing prior to it. If a different rule obtained, as was said by Lord Eldon, "disabilities might travel through minorities for centuries."⁴⁹ Indeed, since 1879, the statute plainly prohibits the extension of the exemption by joining one disability to another. It follows: "The period of limitation shall not be extended by the connection of one dis-

⁴²*Proetzel v. Rabel*, 21 Tex. Civ. App. 559, 54 S. W. 373.

⁴³*Hamilton v. Peck* (Tex. Civ. App.) 38 S. W. 403.

⁴⁴*Pittam v. Foster*, 1 Barn. & C. 248.

⁴⁵*Hannum's Appeal*, 9 Pa. 471.

⁴⁶*Westbrooks v. Jeffers*, 33 Tex. 90.

⁴⁷*Parish v. Alston*, 65 Tex. 194; *Grayson v. Lofland*, 21 Tex. Civ. App. 503, 52 S. W. 121.

⁴⁸*Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799; *White v. Latimer*, 12 Tex. 61; *Thompson v. Cragg*, 24 Tex. 582.

⁴⁹*Angell*, Lim. 242.

ability with another; and when the law of limitation shall begin to run it shall continue to run, notwithstanding any supervening disability of the party entitled to sue, or liable to be sued."⁵⁰ So, where the statute is set running against a woman by the death of her husband, it will not be arrested by her subsequent marriage;⁵¹ or if at the time of the accrual of the cause of action in favor of one, she be not within one of the exemptions, her subsequent marriage will not interrupt the running of the statute already set in motion when the cause accrued.⁵² Neither can its running be arrested by an assignment of the cause of action or sale of the property to one under disability. Such purchaser cannot avoid the statute, for limitations have begun prior to the disability.⁵³ The same rule applies to the plea of stale demand in equitable actions. There can be no tacking of disabilities to defeat it.⁵⁴

§ 314. Husband Pleading Limitation against the Wife.

We have seen that the exemption applies to the wife, even in those extraordinary cases where she may sue the husband.⁵⁵ In personal actions the exemption continues during the coverture; hence the husband may not plead limitations against her demands.⁵⁶ In real actions she is not exempt after arriving at the age of twenty-one years, yet, the husband and wife being one family, the holding of one is the holding of both, and there could hardly be that adversity which could be the foundation of a suit or defense by the one against the other. After the severance of the marriage relation by divorce no reason is apparent why the husband might not plead a limitation to the wife's suit against him upon a cause that existed during their coverture.

⁵⁰Rev. Stat. art. 3376.

⁵¹McDonald v. McGuire, 8 Tex. 361.

⁵²Bowles v. Smith (Tex. Civ. App.)

4 S. W. 381; Best v. Nix, 6 Tex.

iv. App. 349, 25 S. W. 130.

⁵³Eddie v. Tinnin, 7 Tex. Civ. App.

11, 26 S. W. 732.

⁵⁴Wichita Land & Cattle Co. v. Ward, 1 Tex. Civ. App. 307, 21 S. W. 128.

⁵⁵Ante, § 311.

⁵⁶Burnham v. McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887.

CHAPTER XXIII.

JUDGMENT AND EXECUTION.

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|---|---|
| § 315. Validity of General Judgment
against Married Woman. | § 320. Judgment where She is Not
Personally Liable; Costs. |
| § 316. — Contrary Holdings. | § 321. When Judgment against Hus-
band Binds Her. |
| § 317. — Comment. | § 322. Her Confession of Judgment. |
| § 318. Default Judgments; Errone-
ous Judgments. | § 323. Execution. |
| § 319. Collateral Attack. | |

§ 315. Validity of General Judgment against Married Woman.

In an action against the husband and wife for debts contracted by the wife for necessities for herself and children, and for expenses incurred for the benefit of her separate property, the statute provides: "If it shall appear to the satisfaction of the court and jury that the debts so contracted, or expenses so incurred, were for the purposes enumerated in said article, and also that the debts so contracted, or expenses so incurred, were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff."¹ No provision is made for such order in any other character of demand against her. It is only with reference to the particular class of contracts mentioned. But the wife is liable upon her torts, for her antenuptial debts, and in other ways may subject herself to a judgment. What, then, are the requirements, if any, with respect to the contents of the judgment roll, to render valid a judgment against a married woman? If to this statute there be given all the force that could be contended for, it would at most only require that in a judgment against a married woman upon.

¹Rev. Stat. art. 2971.

the class of obligations mentioned the judgment should specifically award execution against the property desired to be reached, whether separate or community. But, as just stated, in the case of judgments against her for her torts, or her antenuptial debts, no such requirement, if it is a requirement, is made. Her liability is personal and general, and depends upon facts which are concluded by the judgment; the judgment is also personal and general. No form of judgment is required; it is not different from judgments against other persons generally. A judgment against a married woman has exactly the same force and effect as one against her husband. The limitations upon her ability to bind herself and property are matters preliminary to, and determined by, the judgment rendered. Prior to the statute above noticed, a judgment against the husband and wife generally, without any specific directions as to the estate out of which it was to be satisfied, could be satisfied by a levy upon either the estate of the husband or the wife, or upon the community.² This has been long followed.³ Pretermittting from our consideration the statute quoted, the question is comparatively easy of solution. With us, unlike at common law, the wife is in many cases liable to a personal judgment to be satisfied out of her separate estate; in short, she is a proper juristic person, upon whom service of process may be had, and against whom judgment in all respects valid may be rendered. And to the judgments so recovered against her, in a court of competent jurisdiction, there attaches the same degree of finality as to those against any other individual. True, where it appears that the judgment is sought against a married woman the petition must show such facts as authorize it; but nowhere is it required that the judgment rendered should contain the evidence upon which the court was authorized to render the judgment. It is matter that cannot be inquired into, except by way of appeal or error, since the character of finality which attaches to all judgments forbids it. So, whatever the source of her liability, whether in her tort or her contract, a general judgment against her is valid

²Howard v. North, 5 Tex. 290.

³Cayce v. Powell, 20 Tex. 767;

Nichols v. Dibrell, 61 Tex. 539.

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ount of goods sold to her husband, and for which she was in no way liable, and relying further upon the article of the statute under discussion, as the judgment of the justice's court did not direct execution against her separate property. On appeal Mrs. Taylor contended that under the article, in order to bind the separate estate of the wife, the judgment of the court should direct execution to be levied upon her separate property. That the judgment in that case being generally against Taylor and wife, without such special direction, it was in effect only a judgment against the community estate. The court held the judgment against Taylor and wife supported the execution against Mrs. Taylor's separate property; and refused to assent to the apparent holding of *Taylor v. Stephens*, 17 Tex. Civ. App. 36, 42 S. W. 1048, that article 2971 "requires that a judgment against a married woman should direct that execution issue against her separate property, and that a general judgment and order that execution issue is no more than a judgment against the community." So, while in neither case the precise question of a judgment against a married woman for necessities or expenses for the benefit of her separate property was before the court, yet the question was considered in each, and contrary conclusions reached.

§ 317. — Comment.

It is not altogether clear, nor probably fair to say, that *Taylor v. Stephens*, 17 Tex. Civ. App. 36, 42 S. W. 1048, holds that judgments against married women, not providing for execution against their separate estates, are no more than against the community. The language used is susceptible of another meaning. However that may be, the better reason seems to be with the doctrine that a judgment generally against a married woman, either alone or jointly with her husband, even though it be upon a contractual obligation such as mentioned in the statute, may be satisfied by levy upon her separate property. The whole tenor of our law recognizes the liability of her property for certain demands. The character of these demands is limited, circumscribed, and defined, but the liability is general upon the particular demands included. Whether or not the particular demand falls within one of the classes upon which she may

be liable is to be determined before judgment; and the conclusive character of a judgment will preclude any investigation back of it to ascertain the character of demand supporting it. Unless the failure to award execution specially against her in those cases where, under the statute, it is authorized, renders such judgments absolutely void, rather than irregular, no court, except by a direct proceeding, could look to see whether the judgment was supported by the character of contractual obligations embraced in the article, or by the wife's tort or antenuptial debt. Again, the terms of the statute are but directory, for the benefit of the plaintiff in the action, and not the defendant wife. If it had been the intention that judgments, even upon the class of demands mentioned, not containing such directions, were to be void, certainly the act could have plainly so stated. However, there can be no question but that a court upon rendering judgment against a married woman upon a demand included in the statute would be authorized to award execution against her separate property or the community at the option of the plaintiff as indicated, and that it should do so. But its omission is but an irregularity, that can avail no one anything. On appeal to reverse it could be remedied by correction.⁴ The case of *Powers v. Parks* (Tex. Civ. App.) 33 S. W. 718, mistakes the character and *quantum* of proof required by this statute to bind the wife upon her contract, for a mandatory direction as to the form of the verdict or judgment. That the debt was for necessities, or for the benefit of her separate property, is a proper thing to be pleaded and proved certainly, and also that they were "reasonable and proper," and the court should instruct the jury that they should be satisfied of these things; but if the legislature had intended to prescribe the form of the verdict or judgment it could have done so in plain terms, and to say that the statute was meant to do as much is extreme.

It might be argued with equal plausibility that the object of the provision awarding execution against the community or the wife's separate property at the discretion of the plaintiff was to remove all doubt as to the liability of the community, not the

⁴*Grant v. Whittlesey*, 42 Tex. 320; *Ans v. Breneman* (Tex. Civ. App.)
Taylor v. Murphy, 50 Tex. 291; Ex- 46 S. W. 80.

separate property of the wife, for the judgment so rendered. The statute authorizing suits against her upon her separate debts does not prescribe that execution shall be specifically awarded against her,⁵ but does prohibit a personal judgment being rendered against the husband, impliedly authorizing a personal general judgment against her, for the act could have no other meaning. If execution be ordered generally upon a personal judgment, what estate could ordinarily be reached? The separate estate of the debtor.⁶ But it has not always been so clear that the community was likewise liable for the wife's debts of the character mentioned in the statute; especially at the early day of the enactment of this statute. The absolute control of that estate by the husband—his ordinarily exclusive right to charge or dispose of it—was well calculated to leave it doubtful that it could be taken for the wife's contracts concerning her separate property, etc., and hence the statute. So, if under the statute there exists a doubt as to which estate would be liable in the absence of a specific direction against it, it would be in favor of the exemption of the community, and certainly without such direction the separate, above all other estates, would be liable. But of course it is well settled, now, that the community estate is also liable to be taken in execution for the wife's debts.

In actions by the wife alone, where she recovers, the judgment is, of course, in her favor alone; but if she be joined *pro forma* by her husband the same should run in his favor as well.⁷

§ 318. Default Judgments; Erroneous Judgments.

The difficulty in the way of some in assenting to the rule as above contended for lies in overestimating the extent of the familiar and well-recognized rule that a judgment will not be permitted to stand against a married woman where the petition does not clearly state such a case as will make her liable under the law. But this is no objection at all to the binding force of judgments generally against married women. The same may

⁵Rev. Stat. art. 1201.

⁶See *Womack v. Womack*, 8 Tex. 197.

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⁷*Houston & T. C. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114, 53 S. W. 834.

be said of judgments recovered against other individuals not similarly incapacitated. A judgment against any one is erroneous where the same is not authorized by the pleadings. This is the whole thing in a nutshell. But by this rule it is not meant that these judgments are void, or even voidable upon a direct proceeding, if by direct proceeding is meant other than the usual appeal or error. They are simply erroneous, and subject to be set aside by proper review, even where the same may be a default judgment.⁸ Such judgments do not carry upon their face their own invalidity. The wife, within certain prescribed limits, is a proper juristic person, as capable of binding herself and estate as any other person who is in all respects *sui juris*. There is little analogy between the common-law rule upon this subject and our own; under the common law, so different from ours in this essential particular, the courts could not render any sort of judgment against her, for the very good reason that in law there was no such person as a wife with power to contract and be sued. She even had no separate individuality. There was no proper juristic person upon whom service could be had, and against whom execution could issue; certainly no judgment could be rendered. With us, however, there is such a person, and the exemption, because of coverture being only partial, is a peculiar defense, which, if not appearing upon the pleadings of the plaintiff, must be pleaded by the defendant herself. In the sense that the common law deemed judgments against married women void for want of a proper defendant upon whom the decrees of the court could operate, our judgments are not void. And we apprehend the true rule to be, that the judgment of a court of competent jurisdiction against a married woman properly before it, upon any cause of action, however erroneous or irregular, is final and binding upon her until set aside by a direct proceeding for that purpose, precisely as though she were sole. It may be pleaded as *res judicata* against her as against any other person;⁹ and, as with other persons, its binding force extends to, and concludes, her upon all questions which actually

⁸See *Laird v. Thomas*, 22 Tex. 276; *Trimble v. Miller*, 24 Tex. 214; *Mernard v. Sydnor*, 29 Tex. 257; *Focke*

v. Sterling, 18 Tex. Civ. App. 8, 44 S. W. 611.

⁹*Nichols v. Dibrell*, 61 Tex. 530.

were, or might properly have been, litigated in the suit. No distinction is made in her favor over others in this respect.

§ 319. Collateral Attack.

This brings us to a consideration of the methods by which judgments against married women may be attacked, on account of their being void, voidable, erroneous, or in any respect irregular. And in this connection as being helpful to a proper understanding of the immediate subject, we append the remarks of Mr. Black in his excellent work on judgments,¹⁰ with regard to the distinction between void and voidable judgments. "The differences, though real and fundamental, are not always marked with sufficient sharpness in juristic writing, and courts have been known to speak of a judgment as 'void,' when they meant no more than that it was liable to be overturned if properly attacked. Now a void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever; it has no effect as a lien upon his property; it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral. On the other hand, a voidable judgment is one which, though not a mere nullity, is liable to be made void when a person who has a right to proceed in the matter takes the proper steps to have its invalidity declared. It always contains some defect which may become fatal. It carries within it the means of its own overthrow. But unless and until it is duly annulled,

¹⁰Black. Judg. 170.

it is attended with all the ordinary consequences of a legal judgment. The party against whom it is given may escape its effect as a bar or an obligation, but only by a proper application to have it vacated or reversed. Until that is done, it will be efficacious as a claim, an estoppel, or a source of title. If no proceedings are ever taken against it, it will continue throughout its life to all intents a valid sentence." While this is a definition by way of giving the attributes and effects of the two kinds of judgments, it is nevertheless clear therefrom that but few judgments are void in the sense there outlined. Certainly under our system the ordinary judgment against a married woman is not, for that reason alone, such an one. And as it is only void judgments—that is, judgments that are mere nullities incapable of being enforced by anyone against anyone—that may be impeached collaterally, it follows that a court having jurisdiction of the subject-matter, and of the person of a married woman, may render judgment against her; and however irregular in not complying with some requirement of law that judgment may be, or however erroneous as matter of law, it will nevertheless be valid and binding upon all parties affected thereby until vacated by a direct proceeding for that purpose, or reversed by proper appeal or error.¹¹ And even upon a scire facias to revive a judgment against a married woman, she cannot impeach the original judgment by interposing a defense which existed at the date of its rendition.¹² As to what is direct, and what collateral, attack, no discussion is here proper. That is governed by rules not peculiar to the law of married women.

§ 320. Judgment where She is Not Personally Liable; Costs.

We have seen that the wife is a proper party defendant in a variety of suits where she is in no way personally liable to a money demand. As where she and her husband jointly execute notes for the purchase money for land with deed taken in her name, and suit be necessary against them foreclosing a lien upon

¹¹Howard v. North, 5 Tex. 290; Taylor v. Harris, 21 Tex. 438; Henson v. Sackville, 2 Tex. Civ. App. 416, 21 S. W. 187; Carson v. Taylor,

19 Tex. Civ. App. 177, 47 S. W. 395; Focke v. Sterling, 18 Tex. Civ. App. 8, 44 S. W. 611.

¹²Baxter v. Dear, 24 Tex. 17.

the land, here she can be sued, but, not being personally liable on her contract, no judgment can be taken against her further than an order of foreclosure.¹³ And where it is proper to render judgment of foreclosure against a married woman, but, because of no showing of her personal liability, improper to render a personal judgment against her, it is held error to render judgment against her even for the costs of the suit.¹⁴ Though it must be confessed that it is not quite easy to understand upon what principle a person, whether married or not, can wrongfully necessitate his joinder in a suit, and then escape with his costs. The recovery of costs in an action is not based upon contract, but is matter of statutory provision, visited in a sense as a penalty upon the unsuccessful party to reimburse the outlay by the other. The statute provides for its recovery by the successful party, except where the court, for good reasons to be stated on the record, awards it otherwise. No exemption is anywhere made of married women. In actions upon demands for which she is personally liable she is liable for the costs doubtless, yet there are no greater reasons why she should be in a case like this, than in any other. Where in any cause she has been by the judgment of the court determined a proper party defendant, and liable to the plaintiff's demands, from whence comes her exemption from costs of such necessary litigation?

§ 321. When Judgment against Husband Binds Her.

Briefly stated, it may be said that where the wife owns or claims any separate estate she will not be bound by the judgment in any action concerning it, where she is not a party to the suit, except it be in those actions for the recovery of her separate property by her husband where the action is brought by him in her behalf under the statute. But in actions against the husband alone for the recovery of property claimed by the wife, she is not precluded by an adverse judgment unless she is

¹³Lynch v. Elkes, 21 Tex. 229; Farr v. Wright, 27 Tex. 96; Covington v. Burleson, 28 Tex. 368; Sigal v. Miller (Tex. Civ. App.) 25 S. W. 1012; Matlock v. Glover, 63 Tex.

231; Linn v. Willis, 1 Posey Unrep. Cas. (Tex.) 158.

¹⁴Linn v. Willis, 1 Posey Unrep. Cas. (Tex.) 158; Garner v. Butcher, 1 Posey Unrep. Cas. (Tex.) 430.

a party defendant to such suit. She may subsequently assert her rights.¹⁵ Or if the property be homestead she is bound by such judgments, only, as are rendered in suits to which she is a party.¹⁶ In those cases where the husband sues for the recovery of the wife's separate property he does so as her statutory agent, and the result of such suit is binding upon her. But with reference to defending her possession or rights, it is not prescribed that he may do so; hence while he must be sued with her, nevertheless if it is meant to conclude her rights she must be personally made a party. She has such interest in all her separate property, and the homestead, as will necessitate her being a party to bind her in actions for its recovery by another. But she has no such interest in the community property of herself and husband. He may sue and be sued alone concerning that, and freely bind himself and wife as well.¹⁷ This is analogous to his right and power to bind her by his contracts with respect to this estate. It could probably make no difference that the community was also exempt to the family by law, since the husband may as freely convey or charge this as nonexempt community; excepting, of course, the homestead.

The husband may, indeed, defend his possession by showing title to be in his wife, but he cannot defend her title so as to bind her.¹⁸

§ 322. Her Confession of Judgment.

After suit filed and service upon the wife, she is then obliged to attend to the matter of her defense in such suit as she may think proper, having full power to do everything necessary or proper in connection with its prosecution that any other person could do. So, if she, whether as plaintiff or defendant, desires to terminate her suit by an agreed judgment, she may make compromise, or she may confess judgment. Certainly she could do directly what she could do indirectly by not appearing. Having the power to confess judgment herself, she necessarily has the

¹⁵Read v. Allen, 56 Tex. 176; Jeffus v. Allen, 56 Tex. 195; Owens v. New York & T. Land Co. 11 Tex. Civ. App. 288, 32 S. W. 1057.

¹⁶Mexia v. Lewis, 3 Tex. Civ. App.

113, 21 S. W. 1016; *ante*, § 295.

¹⁷Newton v. Newton, 77 Tex. 508, 14 S. W. 157; Culmore v. Medlenka (Tex. Civ. App.) 44 S. W. 676.

¹⁸Thomas v. Quarles, 64 Tex. 491.

power to do so through an attorney, either upon oral or written authority; and his acts within the scope of his employment and authority will be binding upon her, as though she did them personally.¹⁹ But her husband cannot do so for her against her consent.²⁰

§ 323. Execution.

Judgment being obtained against the wife, we have seen that no specific direction for an execution against her separate property is required, unless it be upon those demands which were for necessities for herself and children, or concerning her separate property.²¹ In judgments upon this character of demands, the judgment should direct that execution should issue against the separate estate or against the community at the discretion of the plaintiff. In all other demands, as for her antenuptial debts, her torts, and every other, no specific direction is necessary to authorize a levy upon her separate estate. But in such actions execution may be awarded against her only, and not against the husband.²² The execution may be levied upon her separate estate or upon the community, whether the judgment be upon an antenuptial or postnuptial demand.²³

The judgment in the wife's favor, like other property belonging to her, is under the control of the husband, and he is authorized to procure the issuance of the writ of execution at the proper time, and enforce the judgment in his wife's favor. Of course where she has for any reason been permitted to sue alone, she would have the further power to follow up her judgment by obtaining the execution to satisfy such judgment if the same necessity requiring her suit still existed.

¹⁹*Cordray v. Galveston* (Tex. Civ. App.) 26 S. W. 245. And see, generally, *Cayce v. Powell*, 20 Tex. 767; *Laird v. Thomas*, 22 Tex. 276; *Bullock v. Hayter*, 24 Tex. 9; *Urquhart v. Womack*, 53 Tex. 616; *Henderson v. Terry*, 62 Tex. 281.

²⁰*Winter v. Texas Land & Loan Co.* (Tex. Civ. App.) 54 S. W. 802.

²¹*Ante*, §§ 315-317.

²²Rev. Stat. art. 1202; *Tarlton v. Weir*, 1 Tex. App. Civ. Cas. (White & W.) § 145; *Muse v. Burns*, 3 Tex. App. Civ. Cas. (Willson) § 77.

²³*Taylor v. Murphy*, 50 Tex. 291; Rev. Stat. art. 2973.

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²⁰*Winter v. Texas Land & Loan Co.* (Tex. Civ. App.) 54 S. W. 802.

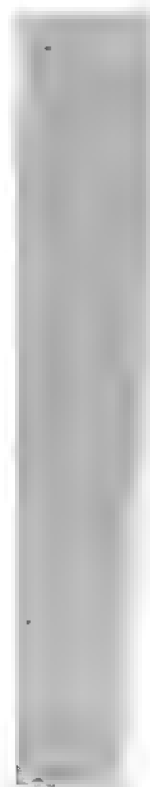
²¹*Ante*, §§ 315-317.

²²Rev. Stat. art. 1202; *Tarlton v. Weir*, 1 Tex. App. Civ. Cas. (White & W.) § 145; *Muse v. Burns*, 3 Tex. App. Civ. Cas. (Willson) § 77.

²³*Taylor v. Murphy*, 50 Tex. 291; Rev. Stat. art. 2973.



PART V.



PART V.

DISSOLUTION OF MARRIAGE.

CHAPTER XXIV.

METHODS AND RESULTS GENERALLY.

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| § 324. Dissolution Terminates Sta-
tus and Community. | and Choses in Action Gen-
erally. |
| § 325. Effect of, on Pending Suits | § 326. Presumptions as to Property. |

§ 324. Dissolution Terminates Status and Community.

A marriage once consummated, the relation continues until dissolved by the death of one of the parties, or by divorce. Mere separation does not have the effect of dissolving the relation; however, it may, and often does, confer upon the wife many rights somewhat inconsistent with her usually recognized disabilities. In a qualified sense separation may make her a *feme sole*, and authorize her to act as one, yet, whatever may be the causes of such separation, and however much the grounds of the separation may authorize a decree of divorce, it is not tantamount to a dissolution of the marriage relation. For, strictly speaking, the community between husband and wife continues regardless of their living apart, until a lawful dissolution by death or divorce; certainly the status of each remains unchanged until that time. And the earnings and other acquisitions of each, not separate under the statute, will continue to fall into the community fund. In practice, however, this result may be varied on account of express or implied waivers and relinquishments, when not prejudicial to third persons. But when there is a divorce, or upon the death of husband or wife, of course the



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status of the parties in the one case, and of the survivor in the other, is immediately transformed, and the individual relieved of all future liabilities and powers incident to marriage. So, too, the community is terminated; there can be no further community between them. For that estate, with its incidental rights and powers, is peculiar to, and wholly dependent upon, the marital relation for its existence. If the parties are divorced they become tenants in common in their community property, in the absence of a judicial partition, and absolute owners of their separate estates. Neither has any further interest in the earnings or acquisitions of the other, and with reference to each other and the world generally they are precisely as though they had never been married. The wife acquires the right to the exclusive management of her separate estate and her share of the community, and the husband loses it. They have no rights in common beyond those that may be enjoyed by strangers. They may testify freely for and against each other, save as to matters that are privileged because of having transpired while the marriage relation subsisted. The husband is no longer the head of the family; indeed, the old family has ceased to exist. There may spring from the divorce two families, with the husband and wife as their respective heads, but they arise from the new relations, and not the old. Thus, they may be entitled to the exemptions due to two families, but it is because they are in fact and in law two, and not one. The wife can no longer charge her husband for her necessities, for it is no longer his duty to supply them. Nor can she charge him on account of their community property. She deals with it as one of the owners, and not as the agent of the community or of her husband.¹ Neither, however, loses his or her rights in their children, nor are they relieved of the duty of supporting them. Necessarily both cannot exercise concurrent control over them, so they are given according to the exigencies of each particular case, considering primarily the interest of the children. This, however, is for another part of this work.²

¹ See *Doyle v. Astor*, 71 Tex. 48.
² See W. 182.
 186, § 507.

Death of the husband or wife leaves the other the head of the family surviving, with custody and support of the children, and with rights and interest in the community and property of the deceased, according to the laws of descent and distribution, where not disposed of by testamentary instrument. This, too, is discussed in other parts of this book.³

§ 325. Effect of, on Pending Suits and Choses in Action Generally.

The term "chose in action" is very broad and comprehensive. Much of the old-time importance of a proper definition of it has passed away, however, since we have little use for the common-law rules applicable to the determination of the husband's rights in the wife's choses in action. The term is said to mean, primarily, "a right to be asserted in an action at law," "a right to recover something in an action," etc.⁴ It includes such things as all rights to one's ascertained chattels (corporeal personalty) out of one's actual or constructive possession, all one's incorporeal personalty in hand or not, all debts or evidences of indebtedness, all ascertained interests, such as the wife's right to a chattel wrongfully taken from her before marriage; her interest and distributive share in an estate before it is settled up; her interest in a lottery prize before it is paid; her bonds, stocks, notes, legacies, remainders, etc., etc.⁵ A chose in action is property within the meaning of our statute defining the separate estates of the spouses, and hence all suits that may be necessary during the coverture concerning this class of property are, of course, prosecuted by the husband under the statute, or by the wife upon his failure or refusal.⁶ But this authority to the husband is for the reason that he is the husband, and for the time only that he occupies that relation. After dissolution by divorce he no longer has any interest in the wife's estate of any character, and of course no authority to institute a suit, or maintain one already instituted, for the recovery of her property. His authority as husband ceases the moment the marriage relation ceases. If there are pending suits by him in his wife's behalf, and divorce is granted, she should be substituted as plain-

³Post, chap. XXVIII.

⁴Stewart, Hus. & Wife, 171.

⁵Ibid.

⁶Ante, § 286.

tiff in them. If he were permitted to further prosecute them it would, of course, be as a stranger for the benefit of another. He would have no beneficial interest whatever in the results of the suit. Upon his death where he is plaintiff, the wife should be substituted if the action be for the recovery of her separate property, or for the recovery of community property if the cause of action be such a one as survives to her.⁷ In case of dissolution by death the survivor brings the suits for his own property and for the community, but the legal representative of the decedent prosecutes all others.⁸

Divorce does not affect the wife's right to sue her husband upon his contractual obligations, nor does it confer upon her the right to sue him for his torts inflicted upon her during coverture.⁹ If the husband is a party defendant *pro forma* with the wife, and divorce is granted, it, of course, relieves him of further attendance upon the case, but she is held to judgment.

§ 326. Presumptions as to Property.

All the effects which the husband and wife may possess at the time the marriage may be dissolved are regarded as common effects or gains until the contrary is satisfactorily proved.¹⁰ This is a statutory declaration of what the law doubtless otherwise would have been held to be, following the doctrine of presumptions already noticed. The presumption in favor of the community character of property acquired during the coverture obtains with great force, and is to be overcome only by evidence the most convincing and satisfactory.¹¹ But the force of the statutory presumption above noticed may possibly extend further than the rule recognized by the authorities cited. These refer to acquisitions made by the spouses during marriage, while

⁷Corsicana Cotton Oil Co. v. Valley, 14 Tex. Civ. App. 250, 36 S. W. 999.

⁸See *Suits By and Against Survivor*, *post*, §§ 383, 398.

⁹Nickerson v. Nickerson, 65 Tex. 281.

¹⁰Rev. Stat. art. 2969.

¹¹Nixon v. Wichita Land & Cattle Co. 84 Tex. 408, 19 S. W. 560; Byrn v. Kleas, 15 Tex. Civ. App. 205, 39 S. W. 980; McCelvey v. Cryer (Tex. Civ. App.) 37 S. W. 175; McKinney v. Nunn, 82 Tex. 44, 17 S. W. 516; Crow v. Fiddler, 3 Tex. Civ. App. 576, 23 S. W. 17; *ante*, §§ 182, 232.

he statute broadly declares that all the effects which the husband and wife may possess at the time of dissolution of the marriage shall be deemed community. No distinction appears to be made between property acquired before and that acquired after the relation began.

CHAPTER XXV.

DIVORCE GENERALLY; JURISDICTION AND GROUNDS.

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| § 327. Prefatory to Discussion. | § 334. — Affecting the Mind. |
| § 328. Early Divorces and Divorce Laws. | § 335. Abandonment. |
| § 329. Present Statute; Jurisdiction. | § 336. Adultery. |
| § 330. Impediments Rendering Contract Void. | § 337. Imprisonment for Felony. |
| § 331. — Wife Enceinte at Marriage. | § 338. Drunkenness, Insanity, Religious Beliefs, etc. |
| § 332. — Marriage Procured by Fraud or Duress. | § 339. Causes Arising Outside of State. |
| § 333. Cruelty, Excesses, and Outrages. | § 340. Conveyances of Property Pendente Lite. |

§ 327. Prefatory to Discussion.

While from a scientific standpoint some may doubt the propriety of discussing divorces as a part of the law of married women, yet the subjects are so intimately associated, and inseparably connected, as to almost preclude a perfect understanding of the one without an incidental discussion of the other. As marriage is the act by which a woman is inducted into, as it were, the status or relation of a married woman, so, divorce is an act by which she passes from that status or relation. By marriage she assumes the duties and liabilities incident to coverture, and by divorce she is relieved of them. If it is important to notice how a woman may become a married woman, it is more important in many respects to see how she may be relieved of the liabilities and duties incident thereto. While by divorce the coverture is ended, and the wife can acquire no more rights, nor incur any more liabilities, as a wife, yet there are numerous rights and privileges already accrued to her, and numerous duties and liabilities already chargeable to her by reason of her

former coverture, that are necessary to be noticed. For these rights and liabilities have come to her because of her coverture, and any discussion of her rights and liabilities as a married woman would, to that extent, be incomplete if it did not deal with them. Property rights in the property on hand at the time of the dissolution, care and custody of their children, payment of their community debts, and other things, are necessary to be noticed. We have, too, purposely omitted from the chapters on Actions, Pleadings, and kindred ones, any discussion of the action for divorce, thinking it preferable to consider that subject as a whole. The rule in many respects varying greatly from those of ordinary actions, and in the main being one of the steps of the act of dissolution of the marriage, and not a simple action or suit, it was thought advisable to so treat the subject. Necessarily we can only treat cursorily of the matter here, and refer generally to works upon that subject.

§ 328. Early Divorces and Divorce Laws.

Our courts have probably from the earliest days of the republic granted divorces from the bonds of matrimony. Our changed conditions brought about by the revolution, and our religion differing so broadly, and customs varying so greatly, from the former Spanish subjects, the rule of the canon law as administered by Spain at that time had little or no application to us in matters of divorce. That law recognized but two causes for a divorce *a vinculo*. They were, first, where two infidels are united in marriage, one is united to the Catholic faith, and the other attempts to molest and divert him or her from the faith, the convert may marry another person; second, where a marriage has been contracted lawfully, but not consummated, if one of them then enters into a convent, the other remains absolutely free to contract another marriage. Many causes were recognized as sufficient to authorize a separation from bed and board. Such as adultery; where one turns heretic, Jew, or Mahometan; when one of them instigates the other to commit crime; cruel treatment; insanity; and disputes and contests endangering the life of one or the other.¹ But by act of Congress December 18,

¹Schmidt's Civil Law, art. 31, p. 9.

M. W.—25.

1837, it was expressly declared that the district courts should have power to hear and determine all suits for divorce, or for separate maintenance, and might decree divorces as well from the bonds of matrimony as from bed and board, or for a separate maintenance. Probably the power thus conferred, to grant divorces, without any express restrictions upon its exercise, should be regarded as equivalent to the power in the statutes in some of the states, by which a court is authorized, in addition to its right to decree separation for prescribed causes, to also grant divorces in other cases where it may be satisfied of the justice of the application, or considers it reasonable and proper that the application should be granted. This is believed to have been the construction and practical effects of the act.² The act was superseded by the act of January 6, 1841, and expressly repealed a few years later, 1846. This last act has always been understood as defining the causes for which a divorce may be granted, and limiting them to those fairly falling within those mentioned; to wit, adultery, abandonment, and cruel treatment, and outrages from one toward the other such as render their living together insupportable. So much for divorces *a vinculo* for causes arising subsequent to the marriage. The act of 1841 authorized the district court to grant nullity decrees for causes existing at the time of the marriage

§ 329. Present Statute; Jurisdiction.

“The district court shall have power to hear and determine suit for the dissolution of marriage, where the causes alleged therefor shall be natural or incurable impotency of body at the time of entering into the marriage contract, or any other impediment that renders such contract void, and shall have power and authority to decree the marriage to be null and void.”³

“A divorce by separation from the bonds of matrimony may be decreed in the following cases: (1) Where either the husband or wife is guilty of excesses, cruel treatment, or outrages toward the other, if such ill treatment is of such a nature as to render their living together insupportable; (2) in favor of the husband where his wife shall have been taken in adultery, or where

²Sharman v. Sharman, 18 Tex. 521.

³Rev. Stat. art. 2976.

he shall have voluntarily left his bed and board for the space of three years, with the intention of abandonment; (3) in favor of the wife, where the husband shall have left her for three years with intention of abandonment, or where he shall have abandoned her and lived in adultery with another woman; (4) in favor of either the husband or wife, when the other shall have been convicted, after marriage, of a felony, and imprisoned in the state prison; provided, that no suit for divorce shall be sustained because of the conviction of either party for felony until twelve months after final judgment of conviction, nor then if the governor shall have pardoned the convict; provided, that the husband has not been convicted on the testimony of the wife, nor the wife on the testimony of the husband."⁴ The suit must be brought in the county in which the plaintiff, whether husband or wife, shall have resided for six months next preceding the bringing of the suit,⁵ and may be appealed to the court of civil appeals, whose decision is final.⁶

The statute^{6'} making the judgment of the courts of civil appeals final in all cases of divorce contemplates, not only the question of divorce or no divorce, but the incidental question of the property rights of the parties, where an issue in the divorce proceeding. The supreme court has no jurisdiction of the cause merely because a determination of the property rights of the parties is sought.^{6''}

§ 330. Impediments Rendering Contract Void.

The only impediment mentioned in the statute is natural or incurable impotency of the body at the time of entering into the marriage contract. The power to annul for other impediments is given; but only for those impediments which have the effect of rendering void the contract. Here we are met with difficulty. In many instances it is quite easy to determine whether or not a marriage contract is void; in others it is not an easy task. The difficulty is greatly augmented by the very lax use of the word

⁴Ibid. art. 2977.

⁴Ibid.

⁵Rev. Stat. art. 1194, § 16; Ibid. art. 2978.

^{6''}Kellett v. Kellett (Tex.) 59 S. W. 809.

^{6'}Ibid. art. 996.

“void.” The canonical disabilities of consanguinity, affinity, and impotency rendered the marriage voidable only; while the statute speaks of impediments rendering the contract void. But by providing a jurisdiction with authority to decree their nullity, the law doubtless intends to employ the word in its milder sense. That is, that such marriages may be annulled or declared void upon application by one of the parties. This, as commonly understood, has reference only to marriages that are said to be voidable. Strictly speaking, a void marriage is one good for no purpose, whose invalidity may be asserted anywhere, at any time, by any person, either during the lifetime or after the death of the parties, whether the question arises directly or collaterally.⁷ When tested by this rule few marriages are really void. But a great variety are nevertheless voidable, and liable to be declared null upon application of one of the parties during their lifetime. Seeing the manner of its use in the statute the purposes of our immediate discussion will be sufficiently subserved to omit any attempted distinction in treating these marriages which under strict rules would be classed as void, or as voidable only.

Those marriages specifically interdicted by statute undoubtedly may be declared null and void. Marriages within the prohibited degrees,⁸ intermarriages between whites and Africans or the descendants of Africans,⁹ and where under the penal law such marriage is bigamous as to one of the parties, are all common-place illustrations of the impediments contemplated by the statute. In determining the validity of a marriage contract no very different rule is applied from that applicable to other contracts. There must be the assent of both parties; where one, then, because of insanity, is incapable of consenting there is an impediment which ought to render void the attempted contract.¹⁰ So, a marriage attempted by persons of immature years—seven at common law—was absolutely void, and if over seven, and yet under fourteen in males and twelve in females, voidable by either upon reaching that age, to wit, fourteen in males and twelve in females. Since if there be a natural or in-

⁷Bish. Mar. & Div. 105.

⁸*Ante*, § 4.

⁹*Ante*, § 4.

¹⁰Bish. Mar. & Div. 128.

rable impotency of one of the spouses there can be no perfect consummation nor procreation; the parties should have their sexual organs and capabilities essentially complete. "For without sexual intercourse," said Lord Penzance, "the ends of marriage, the procreation of children, and the pleasures and enjoyments of matrimony, cannot be attained."¹¹ Bishop defines impotency to be "such an incurable sexual incapacity as admits neither copulation nor procreation."¹² It is partly upon the ground of the inability to consummate the marriage, and partly the ground of fraud, that impotency is a ground for nullity. For that fraud which would ordinarily avoid any other contract would likewise avoid a marital one.

331. — Wife Enceinte at Marriage.

That the wife is pregnant by him at the time of their marriage is no ground for a divorce in favor of the husband. He can hardly claim that he was imposed upon by a condition for which his own criminal act or culpable negligence is responsible. Some of the authorities assert that if pregnancy at marriage is under any circumstances an impediment to marriage, it must be because it will impose upon the husband a spurious offspring.¹³ However, it would appear to be an impediment for the further reason that an immediate copulation and procreation would be impossible. Aside from the question of impediment, it ought, under most circumstances, to be considered such a species of fraud as would entitle him to a dissolution.¹⁴

Antenuptial incontinence of the wife is not ground for dissolution of the marriage. Its concealment is not such fraud as will entitle the complaining party to a decree.¹⁵ That the husband has been deceived with respect to his wife's morals is not distinguishable on principle from his being deceived with respect to her antecedents, her accomplishments, or her wealth. Sexual continence, as the law regards crime, is not nearly so great an

¹¹G. v. G. L. R. 2 Prob. & Div. 287.

¹²Bish. Mar. & Div. 324.

¹³Reynolds v. Reynolds, 3 Allen, 5.

¹⁴McCulloch v. McCulloch, 69 Tex. 682, 7 S. W. 593; Harrell v. Harrell (Tex. Civ. App.) 42 S. W. 1040.

¹⁵Bish. Mar. & Div. 179, 179a.

offense as many others which no one would think of asserting as an impediment to the consummation of a marriage contract.¹⁶

§ 332. — Marriage Procured by Fraud or Duress.

Clearly a marriage procured by force or fraud lacks a very essential element of every valid contract, to wit, an intelligent and willing or free assent. It has always been considered voidable.¹⁷ As early as 1854, Hemphill, Ch. J., upon a case where the marriage license was procured by the husband upon a false affidavit of the wife's age, held that such fraud upon the wife, she being of tender years, and repudiating the marriage as soon as the fraud was discovered, was sufficient to authorize a dissolution. For reasons, he said: "His crime then, if he swear falsely in relation to the age or condition of the female whom he represents and for whom he is acting, not only covers himself with infamy, but involves her, at least, in her possible apprehensions, in moral, though not legal, guilt; and can anyone doubt, if she were warned previous to the ceremony of the commission of the crime, but that she would shrink from the marriage as she would from a gulf that had yawned for her destruction? Whether the marriage, as in this case, be valid at common law by consent of parties or not, yet the plaintiff, and others in her situation, might very justly be unwilling, and refuse, to join in the rites, unless under the sanction of the statute; they might decline a marriage which not only could not appear from the proper offices to have been legally consummated, but which those very offices would show to have been celebrated under licenses obtained, and which could not have been procured otherwise than, by perjury and fraud. The records of those offices, instead of being testimonials of the due, orderly, and regular completion of the marriage, would, at least as one of their effects, be perpetual memorials of the shame and infamy in which the marriage originated, and of the malignant auspices under which it was perfected. . . . Can the law condemn this victim of deception to a perpetual association with the criminal by whom she has been inveigled into what, as to her, should be regarded as a mere mockery of marriage? If so, the boast of the law, that all its

¹⁶See *post*, § 332.

¹⁷2 Kent, 76.

ialities expire in its antipathy to fraud, will be but mere words, having no foundation in truth. A license procured by fraud and perjury will have the same sanction as one based in truth, although immediately repudiated by the innocent party to whom it is attempted to be imposed."¹⁸ The court limits the scope of its decision, however, very properly, to not include those cases where the marriage has been consummated under similar circumstances, but where the parties have lived together as husband and wife. Such assent would give validity to the marriage, and one could not, after acquiescence, be permitted to repudiate it for this reason.

Any force or fraud that prevents a free exercise of the right to assent or disapprove will ordinarily, if availed of in time, be inefficient. It would be a fraud to substitute another for the intended husband or wife, without the knowledge or consent of the contracting party thus imposed upon. And doubtless no court could be found that would lay upon the unfortunate victim of such a fraud, as was imposed upon Jacob of old, the onerous burden of seven years' servitude to rid himself of such an unwelcome use. This is upon the principle that he consents to marry the person whom he actually does marry. A very different case might arise where one falsely impersonated another, and thereby induced a person to marry him. A reputed occurrence illustrates. A man dressing himself in the form of an U. S. N. officer sought and obtained an introduction to a lady as Capt. ——— of the U. S. Battleship ———; the lady had not previously known Capt. ———. His offer of marriage was accepted and the parties married. Here there was an agreement to marry the very individual to whom the lady actually married. The deception was as to his real name, especially as to the position which he claimed to hold in the government employ. Logically, this was no ground for an annulment of the contract.¹⁹

A marriage consummated to escape the punishment for a violation of the seduction law would not be one procured by force.²⁰ If the husband assents willingly to the marriage. It can

¹⁸Robertson v. Cole, 12 Tex. 356.

²⁰Johns v. Johns, 44 Tex. 40.

See *ante*, latter part § 331.

make no difference what his reasons are for assenting; they may be never so urgent, yet he is free to accept or decline the marriage. True, if he declines he may suffer the punishment for an offense already committed, and the force of the circumstances may compel him to accept marriage; yet it is not a marriage procured by force as that word is commonly applied to contracts. If, however, the arrest be unlawful or void, marriage under it to regain one's liberty would be procured by duress, and he entitled to a decree.²¹ In all cases where dissolution is sought upon the ground of duress or fraud, clearly the greatest diligence is required after the discovery of the grounds. For courts will be quick to detect acquiescence, and slow to disturb the stability of the marriage relation except in the most deserving cases.

§ 333. Cruelty, Excesses, and Outrages.

If ill treatment by husband or wife of the other is of such character as to render their living together insupportable, it is cause for divorce. This allows of very great latitude. A variety of circumstances is to be taken into consideration in determining upon it. We shall see that actual personal violence is not alone contemplated. The word "excesses" seems to be of uncertain meaning, and can hardly add to the force of the comprehensive words "cruelty" and "outrages." What is meant by these expressions is a matter of law. Ordinarily the word "cruelty" in such connection means such act or acts as endanger or threatens the life, limb, or health, of the aggrieved party. The jury is to pass upon the existence of the facts supposed to amount to such ill treatment, and the court determines whether or not the facts constitute such "cruelty" or "outrages" as to render their living together insupportable.²² The cruelty or outrage to the wife must be to her individually,—an injury to her person or feelings, not an outrage against law or morals generally;²³ such as making an assault upon her person,²⁴ or making false and cruel charges against her such as amount to an outrage upon her sensibilities, as will be seen in the succeeding section. While a slight and single instance of assault and battery, if so

²¹Bish. Mar. & Div. 212.

²²Byrne v. Byrne, 3 Tex. 336.

²³Lucas v. Lucas, 2 Tex. 113.

²⁴Taylor v. Taylor, 18 Tex. 574.

accompanied by other circumstances which go to make such treatment insupportable, will be sufficient to authorize a decree,²⁵ yet rarely it is not every outburst of anger, even if accompanied by actual violence, that ought to decree a perpetual severance of the marital relation. We shall see that the circumstances surrounding the ill treatment have much to do with the consequences. Recrimination may defeat entirely what would otherwise be good cause for dissolution. Even aside from recrimination and abandonment, if the circumstances indicate that the act of cruelty is not such as would likely seriously endanger the person or feelings of the injured one, and would probably not occur again, and did not amount to such ill treatment as to make longer marital relations insupportable, most clearly it would be a perversion of the law to grant a divorce for it. Neither cruelty nor blows are made causes for divorce *eo nomine*.

The act of the husband in communicating to his wife a venereal disease is such cruelty to the person and health as may amount to cause for divorce.²⁶

34. — Affecting the Mind.

By far the most frequent occurrences of cruelty and outrages are those which do not consist of personal violence in the sense of assault and batteries, but of false and wicked charges and slanderous words and mental injuries and provocations, spoken and to one spouse by the other. The ill treatment contemplated by the statute has often been held to include injury to the feelings and sensibilities as well as physical injuries. Indeed, a more serious injury, or wicked cruelty, could well be imagined than the false and wicked imputations of a depraved and malicious husband aspersing the good name of his wife and charging her with sexual sin, or similar crimes. It is well calculated to work infinitely more serious results to the conjugal felicity than mere personal violence; more calculated to render their living together insupportable. As already indicated, the fact of personal violence, even when it amounts to an actual blow, is not of controlling consequence. If there be reasonable apprehension

²⁵Miller v. Miller, 72 Tex. 250, 12 W. 167.

²⁶Hanna v. Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720.

of personal violence of such character as interdicted by the statute, that is sufficient; while it may yet happen that actual violence inflicted is not of that character. Many things are to be considered,—the habits and character of the parties; their previous training and their standing in society; the provocation given by the complaining party; the frequency of the alleged ill treatment; and the like facts. In the nature of the thing, however, this apprehension cannot be predicated of mental injury, or ill treatment affecting only the sensibilities. There must be an actual infliction of such injury; and here, again, the jury judging of the truth of the existence of such things, the court determines of their sufficiency under the statute. It is said in one of the cases²⁷ that a constant dread of violence might render a wife's married life insupportable, and that this is all that is required by our statute to authorize a divorce. The dread, however, which was shown to exist in that case, had just foundation in fact; physical violence had already been committed upon the person of the wife, and numerous acts and declarations of the husband had already occurred to very justly give the wife cause for alarm; and the language must be taken with this qualifying information.²⁸ The ordinary meaning of "cruelty," as used in the statute, is broad enough to include outrages upon the feelings, inflicting mental pain or anguish; such as charging the wife with being a prostitute, or with unchastity;²⁹ a series of studied vexations and deliberate insults and provocations, without apprehension of personal violence or bodily hurt;³⁰ murder of the wife's child by the husband;³¹ menacing the wife with a whip and a chair, forcing her to flee for safety, accompanied by violently abusive language to her mother and sister, forbidding them to wait upon her in her confinement;³² threats to murder wife;³³ calling the wife a d—d strumpet and bitch, and charging her with taking his money;³⁴ and similar charges, provoca-

²⁷Huilker v. Huilker, 64 Tex. 1.

²⁸Taylor v. Taylor, 18 Tex. 574.

²⁹Pinkard v. Pinkard, 14 Tex. 356; Jones v. Jones, 60 Tex. 451; Bahn v. Bahn, 62 Tex. 518; Williams v. Williams, 67 Tex. 198, 2 S. W. 823, and note in 2 S. W.

³⁰Sheffield v. Sheffield, 3 Tex. 79.

³¹Wright v. Wright, 6 Tex. 3.

³²Shreck v. Shreck, 32 Tex. 578.

³³Sackrider v. Sackrider, 60 Iowa, 397, 14 N. W. 736.

³⁴Spruill v. Spruill, 1 Posey Unrep. Cas. (Tex.) 244.

is, and insults. But in the nature of things, considering the weakness of man to err, and the levity usually attached to such charges when made against a man as compared with the seriousness of it when made against a woman, a charge by the wife against the husband accusing him of adultery will not ordinarily amount to such ill treatment as to give cause for divorce.³⁵ It possibly could be sufficient, but the probabilities are that it would probably not so pain the sensibilities as to put further conjugal peace and happiness out of the question. A case out of the ordinary would have to be shown. The mere fact that the wife had made an unsuccessful attempt to place the husband under a recognizance bond for alleged threats against her will not, of itself, amount to cruelty or outrage.³⁶ Nor will the expression of the wife of her belief that her husband intended to kill her.³⁷

Quarreling, and occasional outbursts of temper, accompanied by no threatened injury, are not causes.³⁸ Incompatibility of tempers; failure of the husband to support the wife;³⁹ declarations of lack of respect and love, are likewise not sufficient to amount to cruelty or outrages. When a woman marries, she assumes the risk of her husband's supporting her, and his failure to do so, where such failure is the result of misfortune rather than intentional neglect, will not entitle her to a dissolution of marriage ties. So, too, when a man marries a woman he assumes the risk of her loving him, and of their tempers being compatible; if it prove otherwise, the sacred relation of husband and wife cannot be severed for so slight a cause.⁴⁰ It is not intended to be understood from what has been said that the husband's omissions may not in any case amount to cruelty and outrages within the statute, for clearly they may. Where there is a willful failure to supply medicine and a physician when sick, or food and raiment when necessary, such acts may seriously en-

McAlister v. McAlister, 71 Tex. Civ. App. 10, 10 S. W. 294.

Burney v. Burney, 11 Tex. Civ. App. 174, 32 S. W. 328.

Sapp v. Sapp, 71 Tex. 348, 9 S. W. 258.

³⁵Jones v. Jones (Tex. Civ. App.) 41 S. W. 413.

³⁶Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

⁴⁰Scott v. Scott, 61 Tex. 119.

danger the health, and painfully distress the mind, in such manner and to such extent as to justify a divorce.⁴¹

The conduct or language of the husband making charges against the wife, to have the effect of legal cruelty, must be made without just cause; as said in *Loring v. Loring*, 17 Tex. Civ. App. 95, 42 S. W. 642, "a wife cannot complain of the charge if she aroused her husband's suspicions by her indiscreet conduct. . . . For if the words are provoked by her conduct, she cannot obtain a divorce, as the remedy is in her power, if she will mend her ways or explain her conduct in such a way as will remove the grounds of the suspicions which provoked the words." And the same authority holds that the husband is not only justified in inquiring into his wife's suspicious conduct, but that it is his duty to do so, and to tell her of his suspicions that she may allay them. But so long as the husband treats his wife with consideration, and faithfully observes his promise to her, it can make no difference what his conduct toward the outside world may be, no court will hear her prayer for separation. To the world he may be an outlaw, a brigand, the "vilest of the vile," yet he would not be guilty of the excesses defined by the statute. Such excesses must affect her directly, not remotely.⁴² Justice Lindsay has beautifully said: "Unless she is so affected, in body or in spirit, duty enjoins forbearance and submission, and the fostering of the sentiment expressed in the distich of the poet:

" 'I know not, I ask not, if guilt's in that heart,
I but know that I love thee, whatever thou art.' "⁴³

§ 335. Abandonment.

It is not every separation that is an abandonment; nor is it every abandonment that gives ground for divorce. Neither is every inexcusable leaving an abandonment. The circumstances surrounding it must be shown to establish that important element,—the intention not to return to the conjugal society.⁴⁴

⁴¹*Eastman v. Eastman*, 75 Tex. 473, 12 S. W. 1107.

⁴²*Sharman v. Sharman*, 18 Tex. 521.

⁴³*Shreck v. Shreck*, 32 Tex. 590.

⁴⁴*Hare v. Hare*, 10 Tex. 355.

the intention alone sufficient to authorize the suit, unless accompanied by an actual separation for the period of time prescribed, both elements being essential to every abandonment.⁴⁵ Mere separation of the spouses for three years does not authorize a divorce, nor even necessarily lead to the conclusion that it was the intention of a permanent separation. But an intended permanent separation by one spouse from the other without sufficient excuse, for the prescribed period, is expressly given ground for divorce. It is not required that the abandonment be accompanied by any act of cruelty, or other ill treatment—whatever, bare separation being sufficient.⁴⁶ This intention not to return, however, is shown as any other fact, either by direct or circumstantial evidence. The abandonment, to be valid, must not have been caused, nor assented to, by the complaining party.⁴⁷ It must have been the deliberate act of the complaining spouse without legal excuse or moral justification.⁴⁸ Separation by mutual consent, or upon good cause, can meet the requirements. This lack of assent to such absence must remain with the complaining party for the full period of abandonment, or until the expiration of three years. For if the complaining spouse repent, and offer to return, it is the duty of the defendant to receive him back; refusing, no divorce can be had for abandonment.⁴⁹ If one by his cruelty or other ill treatment compels his wife to leave him for her own protection, such conduct in disposition, being kept up for the statutory period, would in itself render him guilty of desertion, and his wife would be entitled to a divorce upon that ground alone.⁵⁰ Voluntary absence, as by confinement in the penitentiary,⁵¹ or in an insane asylum,⁵² will not amount to abandonment.

Pinkard v. Pinkard, 14 Tex. 356.

Schuch v. Besch, 27 Tex. 390.

Roberson v. Roberson, 2 Posey Cas. (Tex.) 451.

McGowan v. McGowan, 52 Tex.

McGowan (Tex. Civ. App.) 50 S. W. 399; Curtis v. Cockrell, 9 Tex. Civ. App. 51, 28 S. W. 129.

⁴⁶Camp v. Camp, 18 Tex. 528.⁵¹Sharman v. Sharman, 18 Tex. 521.

Hannig v. Hannig (Tex. Civ. 24 S. W. 695; McGowan v.

⁵²Pile v. Pile, 94 Ky. 308, 22 S. W. 215.

§ 336. Adultery.

It is ground for divorce in the husband's favor if the wife "shall have been taken in adultery." To authorize a decree in the wife's favor, the husband must have "abandoned her and lived in adultery with another woman." A single act of indiscretion upon the part of the weaker vessel exposes her to the loss of her husband and family; his, however often repeated, unless accompanied as well by the additional sin of abandonment, is not matrimonial sin in the eye of the law.⁵³ By whose authority is this distinction made?—this premium upon marital licentiousness: this mandate to pure wives to embrace adulterous husbands! Suffering women have borne it meekly, and a discussion of the question has not often arisen.⁵⁴

Adultery as a ground for divorce is subject to this qualification: "In any suit for divorce for the cause of adultery, if it shall be proved that the complainant has been guilty of the like crime, or has admitted the defendant into conjugal society or embraces after he or she knew the criminal fact, or that the complainant (if the husband) connived at his wife's prostitution, or exposed her to lewd company whereby she became ensnared to the crime aforesaid, it shall be a good defense and a perpetual bar against said suit; or if it appears that the adultery complained of is occasioned by collusion of the parties, and done with intention to procure a divorce, or where both parties shall be guilty of adultery, then, no divorce shall be decreed."⁵⁵ It seems to be almost universally held, both in England and in this country, independent of any statute upon the subject, that one himself guilty of adultery cannot obtain a divorce against the other upon that ground. The statute is probably declarative, and not remedial. It seems to make no difference which was the earlier offense; or that plaintiff's was committed after the separation on account of defendant's crime.⁵⁶ The statute denies divorce where "both parties shall be guilty of adultery;" once committed, no period of time can remove guilt; it is, and

⁵³Rev. Stat. art. 2977; *McAlister v. McAlister*, 71 Tex. 695, 10 S. W. 294.

⁵⁴*Johnson v. Johnson* (Tex. Civ. App.) 23 S. W. 1022.

⁵⁵Rev. Stat. art. 2981.

⁵⁶*Haines v. Haines*, 62 Tex. 216.

ought to be, a perpetual bar to a divorce against the other upon that ground.

§ 337. Imprisonment for Felony.

It is by force of the statute alone that imprisonment in the state prison is ground for a divorce. Previous to the act, imprisonment was not within any of the definitions contained in the statute.⁵⁷ But little room seems to be left for questions concerning the act. It would probably make no difference when the crime was committed, since it is the conviction and imprisonment after marriage that gives cause for divorce. It was doubtless the intention of the legislature to relieve in such cases, upon the principle of abandonment; absence in such cases in many instances necessitating a severance of the marriage relation that is only such in name. It would follow, then, that unless a divorce were obtained during the imprisonment of the husband or wife, as the case may be, that no decree should be granted. For by act, none shall be granted within a year, nor then if the convict shall have been sooner pardoned, and after a year, if the imprisonment has for any reason ceased, there is no cause for divorce; if there is an offer to return to the marital duties, the analogy to cases of abandonment still holds, and the offer should be accepted. The language of the act indicates that it was not the purpose to make conviction and imprisonment necessarily a ground; it is because of the absence necessitating such action. The court would, too, no doubt, refuse an application if it appeared that the conviction of the husband was wrongfully procured by the wife, although she may not have actually testified herself. Otherwise would be to violate the spirit, if not the letter, of the act. Aside from the act, it would be a violation of the principle that one cannot take advantage of his own wrongful conduct.

§ 338. Drunkenness, Insanity, Religious Beliefs, etc.

There are no other causes for divorce arising subsequent to marriage, than those enumerated in the statute. It is only as an

⁵⁷Sharman v. Sharman, 18 Tex.
521.

act or series of acts falls fairly within one of these statutory grounds as interpreted by the courts, that it will authorize a divorce. Drunkenness, opium eating,⁵⁸ and the like, to whatever excess carried, are not of themselves causes for divorce. If the indulgence goes to the extent of incapacitating one for the discharge of his conjugal duties, or causes him to neglect the support of his family, or makes him abusive and cruel, his intoxication would be a potent circumstance in determining the character of his treatment; or it might give just cause for a separation from him, and if persisted in, in time, entitle the injured spouse to a divorce upon the ground of abandonment.⁵⁹ Or drink and intoxication may cause and otherwise aggravate cruel and outrageous treatment, and thus give cause.⁶⁰ But this is the utmost that can be said. Insanity is not a ground for divorce; nor can it be conceived how it is possible for it to come within the purview of statute under any circumstance. Confinement in an asylum on account thereof is not abandonment,⁶¹ nor can the conduct of one thus overwhelmed with misfortune be denominated cruelty. But if the conduct be the act of a rational defendant it will be measured by the rules of law already noticed, and it can make no difference from what source or cause the act emanates; it is the conduct and treatment, and not the source of its inspiration,—except as the complaining party may be to blame,—that gives cause for divorce. One's religious beliefs, then, or the teachings of a sect to which he or she belongs, have nothing to do with the case.⁶²

§ 339. Causes Arising Outside of State.

It is well settled, both on principle and authority, that our courts have jurisdiction to hear and determine suits for divorce for causes arising outside of the state.⁶³ "A man going abroad to commit adultery is just as unfit a companion for his wife, the interests of society just as much require the dissolution of the marriage, and private interest calls as loudly for it, as though he

⁵⁸Finley v. Finley, Ky., 2 S. W. 554.

⁵⁹Inte. § 335.

⁶⁰Camp v. Camp, 18 Tex. 528.

⁶¹Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90.

⁶²Eastman v. Eastman, 75 Tex. 473, 12 S. W. 1107.

⁶³Cooley, Const. Lim. 400, 401.

id the wrong in his own country.”⁶⁴ By comity we accept the marriages of persons in other jurisdictions as being valid, precisely as though they were celebrated here in accordance with our laws. Yet they are no more binding than if they were so celebrated, and where the parties come to us, if their marriage is for any reason voidable, our courts may so declare. We deal with the status of the individual placing himself within our jurisdiction.⁶⁵ We test the right to a divorce by the existence or non-existence of our statutory grounds,—not those of the jurisdiction where the marriage was celebrated, nor yet where the offense was committed.⁶⁶ Again, we recognize the validity of the marriage celebrated abroad, after the parties have domiciliated here, only to the extent that the continuance of their marital relations is not inimical to our laws. It is not thought that a marriage broad of parties prohibited from marrying under our laws would be valid upon their removal to this state.

340. Conveyances of Property Pendente Lite.

“On or after the day on which the action for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife.”⁶⁷

“At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisal to be made of both real and personal estate which are in possession of the husband, and an injunction restraining him from disposing of any part thereof.”⁶⁸ Pending the suit the court “may make such temporary orders respecting the property and parties as shall be deemed necessary and equitable.”⁶⁹ The right to a restraining order, from the emphatic language of the statute, seems to be given as matter of course upon the application of the wife, and but little discretion left with the court

⁶⁴Bish. Mar. & Div. 171.

⁶⁵Jones v. Jones, 60 Tex. 451.

⁶⁶Hare v. Hare, 10 Tex. 355; Morey v. Morey, 82 Tex. 308, 17 S. W. 838.

M. W.—25.

⁶⁷Rev. Stat. art. 2083.

⁶⁸Ibid. art. 2984.

⁶⁹Ibid. art. 2985.

to refuse it. Its granting, however, as to matter of form, is doubtless intended to be controlled by the rules applicable to granting injunctions generally.⁷⁰ During the pendency of divorce proceedings, in the absence of a restraining order, the husband still has the right of disposition over the community property, subject to the restriction, specially, that he must not alienate the same with a fraudulent view of injuring the rights of his wife. He may freely convey if he does so in good faith; as for the preservation of the community and the like.⁷¹ His conveyance could not be impeached because it happened that there was not sufficient property remaining to satisfy any demand which she might establish against him. The *mala fides* of the transaction is the gist of the power to avoid, and the burden of establishing it is upon the party asserting it.⁷² If, however, the conveyance be for the fraudulent purpose of injuring the wife in her rights therein, it can make no difference that the purchaser had no notice of such intention, or that he paid value therefor, as the doctrine of *lis pendens* applies.⁷³ A lienee whose lien is fixed upon the property pending the suit is, of course, in no better position than a purchaser.⁷⁴

⁷⁰Wright v. Wright, 3 Tex. 168.

⁷¹Moore v. Moore, 73 Tex. 383, 11 S. W. 326.

⁷²Hagerty v. Harwell, 16 Tex. 663.

⁷³Randall v. Snyder, 64 Tex. 350;
Harl v. Langdon, 60 Tex. 355;

Moore v. Moore, 59 Tex. 54, S. C. 67 Tex. 293, 3 S. W. 284; Berg v. Ingalls, 79 Tex. 522, 15 S. W. 579.

⁷⁴Ghent v. Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891.

CHAPTER XXVI.

DIVORCE; PLEADINGS, DEFENSES, AND EVIDENCE.

341. The Petition.	§ 348. — Illustrations; Cases.
342. The Citation.	§ 349. Parties as Witnesses; Their
343. The Answer.	Admissions and Statements.
344. Presumptions.	§ 350. Collusion of Parties; Their
345. Recrimination.	Agreements, etc.
346. Condonation.	§ 351. Testimony of <i>Particeps Crimi-</i>
347. Quantum of Proof Required.	<i>inis.</i>

§ 341. The Petition.

The venue of suits for divorce is determined by the residence of the petitioner; and the first essential requisite of a petition is an allegation that the petitioner is a bona fide inhabitant of the state, and has resided in the county where suit is brought for six months next preceding the filing of the suit.¹ An allegation that plaintiff "is a bona fide citizen of the county of Bell, state of Texas, and has been for more than six months before the filing of this petition," has been held not responsive to the requirements of the statute. It was said that such allegation "may be true, and he still may not have been an actual bona fide inhabitant of this state and resident of Bell county for six months next preceding the filing of his petition for divorce."² But an allegation by plaintiff that "in 1894 they moved to the state of Texas, and took up their residence in Ft. Bend county, and that plaintiff since that time has resided, and now resides, in that county," where the petition was filed in March, 1899, is suffi-

¹Rev. Stat. art. 2978.

²Haymond v. Haymond, 74 Tex.
414, 12 S. W. 90.

cient.³ A valid, subsisting marriage must, then, be alleged, as without this there is nothing to dissolve.⁴ The grounds entitling petitioner to a decree should be stated clearly and particularly, giving as far as possible dates, places, and details. The allegation should not be in general terms, as that defendant is guilty of cruelty and outrages such as render their living together insupportable.⁵ However, if such allegation is followed up by distinct allegations of specific acts, which may or may not be included in the general charge, it is sufficient.⁶ If abandonment be the ground, the petition must contain such allegations to show that the desertion was voluntary upon the part of defendant, without the fault, consent, or procurement of plaintiff, and with the intention not to again resume the marital relations.⁷ Adultery, unlike abandonment and cruelty, not being a question of law, may be charged generally as adultery. The time and place, and the person with whom committed, if known, should be stated. If the wife be plaintiff in such charge she should further aver the husband's abandonment of her and living in adultery with his paramour.⁸ If false and cruel charges form the basis of the count, they should be set out in detail as any other acts of cruelty, and their falsity asserted, that the court may judge of their sufficiency. Where charges of unchastity are made against a wife the law will probably presume them false and a denial in the petition unnecessary;⁹ but when made against the husband, the law is not so kind, and he ought to deny their truthfulness when he seeks a divorce because of their utterance.¹⁰ Even then, in the absence of special facts and circumstances averred, no cause of action is shown in his favor, as we have already seen.¹¹ Praying for a divorce upon the

³Needles v. Needles (Tex. Civ. App.) 54 S. W. 1070.

⁴Wright v. Wright, 6 Tex. 3; Andrews v. Andrews, 75 Tex. 609, 12 S. W. 1124.

⁵Byrne v. Byrne, 3 Tex. 336; Nogeas v. Nogeas, 7 Tex. 538; Jones v. Jones (Tex. Civ. App.) 41 S. W. 413.

⁶Wright v. Wright, 3 Tex. 168; Jones v. Jones, 60 Tex. 451.

⁷Hare v. Hare, 10 Tex. 355; Beach v. Besch, 27 Tex. 390.

⁸Johnson v. Johnson (Tex. Civ. App.) 23 S. W. 1022.

⁹Williams v. Williams, 67 Tex. 198, 2 S. W. 823.

¹⁰Huckabay v. Huckabay, 35 Tex. 620.

¹¹McAlister v. McAlister, 71 Tex. 695, 10 S. W. 294.

ground of the incarceration of the defendant in the state prison, the petition should state not only the conviction and imprisonment, but that twelve months had expired since the final judgment of conviction, that no pardon had been granted him, and that the conviction was not procured upon the testimony of the petitioner; and the writer thinks the petition should further show that the defendant was still so imprisoned at the time of filing the suit.¹²

If the action be one to obtain a decree annulling the marriage for an impediment to the contract, existing at the time of the marriage, the specific hindrance, fraud, force, or other fact or facts, together with the plaintiff's lack of knowledge, acquiescence, or other excuse, should be specifically alleged in detail. With respect to the allegations concerning property, the petition should inventory and describe, as far as possible, the property sought to be affected by the decree. A failure to do so must be reached by a special exception; and where the wife charges that she is unable to fully list and describe the same, and the husband refuses to furnish such information in a proper way, the court has the power to determine the same, and embody it in the decree. But its power extends only to property within this state.¹³

If either spouse has received a portion of the property before the decree of partition, an offer to return the same or to allow the court to consider it in the division should be made.¹⁴

The petitioner, when the wife, may, upon making oath that she fears her husband will waste her separate property, or their common property, or the fruits or revenue produced by either, or that he will sell or otherwise dispose of the same so as to defraud her of her just rights, or remove the same out of the limits of the county during the pendency of the suit, obtain a writ of sequestration, and seize such property pending the divorce proceeding.^{14'}

§ 342. The Citation.

Since the residence of the plaintiff determines the jurisdic-

¹²Ante, § 337.

¹³Ibid.

¹⁴Moor v. Moor (Tex. Civ. App.)
57 S. W. 992.

^{14'}Rev. Stat. art. 4864.

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W. 178, illustrates the liberal tendency of the courts. The plaintiff alleged that he was a bona fide resident of Harris county, Texas, and that defendant was a resident of New York. The defendant was personally served with citation in New York. She failed to answer on the first day of court, and a week later, no answer yet being filed, the court granted an *ex parte* trial, and decreed a divorce. On the same day, and before the decree was entered, the attorneys for the defendant appeared in court and asked that the order be set aside, tendering an answer, which, among other things, attacked the bona fides of plaintiff's allegations as to his residence, and asserted his bona fide residence to be in New York. Her sworn application for a continuance filed with the answer stated that she had a good defense which she could prove upon time being allowed her. The supreme court thought the trial court erred in not setting aside the decree and permitting the answer to be filed. Several matters are discussed, but the apparent reason for the holding is the liberality of the law in encouraging defenses to divorce suits, and in seizing upon the slightest error as an excuse for permitting them.

§ 344. Presumptions.

The law always, whether in criminal or civil proceedings, graciously holds everyone innocent of wrong or crime until the contrary be proved. There is every reason to apply the principle to divorce proceedings. No presumptions will be indulged in favor of an application for a decree,—of the truth of the matters alleged, whether the same be sworn to or not. Consistent with this principle, if a husband asperses his wife's name for virtue, the law presumes her innocent, and she need neither allege nor prove it.²⁰ And where the husband sues for a divorce because his wife gave birth to a fully developed child within three and a half months after their marriage, but offers no proof that the child is not his, the decree will be refused; the presumption being that he is the father.²¹ This presumption favors marriage, yet in a divorce proceeding it must not be left to presump-

²⁰Williams v. Williams, 67 Tex. 198, 2 S. W. 823.

²¹McCulloch v. McCulloch, 69 Tex. 682, 7 S. W. 593.

tion alone to establish a valid marriage. The law will presume nothing concerning it in that connection, since there is no necessity for a presumption either for or against marriage. Divorce itself will be presumed after a considerable lapse of time, and especially where one's innocence of crime depends upon the existence of such divorce.²²

§ 345. Recrimination.

Recrimination is a valid defense to an action for divorce where the facts authorize its interposition. It is said to be the "important and recognized rule that recrimination as a valid defense must arise out of the fact that the acts or conduct for which the plaintiff seeks a divorce were induced by, or in retaliation of, plaintiff's conduct."²³ The misconduct of plaintiff which will defeat the right to a divorce, while it need not be of equal degree with that of the defendant, must be of the same general character, and such as is reasonably calculated to have provoked the misconduct of the defendant;²⁴ this for the reason that it would be altogether wrong to allow one person to recover for the wrongful act of another of which he is himself guilty, or which he has by his wrongful conduct produced. This does not signify that the person complaining must be altogether free from fault in the matter complained of. Some allowance will be made for human frailty. A rule requiring the plaintiff to be blameless as a condition upon which relief would be granted would be unreasonable and well nigh upset the business of granting divorces. Yet if the proof shows that there was only slight difference in the degrees of their guilt, although the plaintiff may be less at fault than the defendant, the court will not interfere to grant a divorce. "In such cases, the parties are 'suitable and proper companions for each other;' . . . and 'may live together, and find sources of mutual forgiveness in the humilia-

²²Harvey v. Carroll, 72 Tex. 63, 10 S. W. 334, S. C. 5 Tex. Civ. App. 324, 23 S. W. 713; Nixon v. Wichita Land & Cattle Co. 84 Tex. 408, 19 S. W. 560.

²³Trigg v. Trigg (Tex.) 18 S. W. 314.

²⁴Bohan v. Bohan (Tex. Civ. App.) 56 S. W. 959; Cunningham v. Cunningham, 22 Tex. Civ. App. 7, 53 S. W. 75.

ion of mutual guilt.'"²⁵ If, however, the recrimination is light and insignificant as compared with the conduct of the defendant, a divorce may be granted. Where the wife petitioned for a divorce, and the testimony showed that, while the husband usually began the quarrels, she participated in them freely; and that, while he had begun the attack on one or two occasions, she had on another, by getting in the first blow, dealt him a "knock out," and choked and bruised him, it was not thought that she was entitled to a decree.²⁶

The text writers give a broader scope to the defense than our courts seem to have adopted. Mr. Bishop says that it is "the defense that the applicant has himself done what is ground for divorce, and bars the suit founded on whatever cause, whether the defendant is guilty or not;"²⁷ and Browne says it "is the defense that the applicant himself has done some act which is a ground for divorce."²⁸ And the general doctrine seems to be that it is not required that the recriminating conduct be produced by, or grow out of, the conduct relied upon for a decree. We have already examined the statute defining what acts will bar an action for adultery.²⁹

346. Condonation.

Reconciliation of conjugal differences ought to be encouraged. The law does encourage them. Whatever may have been the enormity of the conjugal sin, society and the injured spouse are profited more by reconciliation, where that is possible, than by divorce. When injured innocence can forgive, the benedictions of the law should follow. This forgiveness, however, is conditioned, in a measure, upon the offender's sinning no more; for a constant forgiving will in time amount to a license to err. Where a reconciliation has been had, it is probably useless to say that no divorce can be had for acts and conduct antedating the condonation. However, when new acts and conduct authorize an action, the old ones may be taken into account. They are re-

²⁵Hale v. Hale, 47 Tex. 336.

²⁶Beck v. Beck, 63 Tex. 34.

²⁷Bish. Mar. & Div. 78.

²⁸Browne, Divorce, 80.

²⁹Ante, § 336.

removed and the impediment created by the reconciliation is removed."

Reconciliation, technically called condonation, is not a perpetual bar save in cases of adultery where the complainant has admitted the offender into conjugal society or embraces after he or she knew of the criminal fact.³¹

The rule of condonation is less stringent when applied to women than to men. They are more ready to forgive and forget.³²

§ 347 Quantum of Proof Required.

"Full and satisfactory evidence" is the measure of the standard.³³ And first, the fact of residence for the prescribed time must be proved, for this is jurisdictional. Next, a valid subsisting marriage must be shown. This may be done by proof of general reputation.³⁴ A reputation of parties, and general reputation is what is vital, and this character of evidence may amount to the full and satisfactory evidence required.³⁵ The admission of the marriage in the defendant's answer will not dispense with the necessity of proving it.³⁶ Testimony that the parties lived together is not sufficient to show that they lived together as man and wife, and amount to a proof of marriage.³⁶ It may be necessary for the necessity to resort to this character of evidence to prove the marriage. A peculiarity of trials of this character is, that the proof must be full and satisfactory to the court, even when the jury may have found the material allegations of the petition true. For the court is not bound to make the same conclusion finding, but should it be of opinion the proof is not satisfactory, may nevertheless refuse to grant the divorce. It is not meant merely that the court must be satisfied of the truth of the facts alleged, but of the evidence supporting them as well, independently of the verdict of the jury as to the truth of the facts. While the evidence ought to fully

³¹ *Wright v. Wright*, 6 Tex. 388.

³² *Simons v. Simons*, 13 Tex. 468.

³³ *Id.*, 13 Tex. 468.

³⁴ *Wright v. Wright*, 6 Tex. 388.

³⁵ *Id.*, 6 Tex. 388.

³⁶ *Id.*, 6 Tex. 388.

³⁷ *Id.*, 6 Tex. 388.

³⁸ *Wright v. Wright*, 6 Tex. 3.

³⁹ *Simons v. Simons*, 13 Tex. 468.

⁴⁰ *Belger v. Belger*, 1 Tex. Civ. App. 32 S. W. 40.

⁴¹ *Moore v. Moore*, 22 Tex. 237.

⁴² *Paulson v. Paulson*, 1 Tex. Civ. App. 21 S. W. 778.

and conclusively establish the truth of the material allegations of the petition to the satisfaction of the court,³⁹ yet the action of the trial court is subject to review by the appellate court,⁴⁰ and in a proper case the decree may there be rendered;⁴¹ or the party dissatisfied should move in the trial court for a new trial and tender the additional testimony.⁴² The rule requiring full and satisfactory evidence, however, does not alter the ordinary rules of evidence so as to preclude the introduction of any character of evidence that is ordinarily admissible; it relates rather to the sufficiency of the evidence than to its evidentiary character.

§ 348. — Illustrations; Cases.

Evidence that only raises a suspicion of the fact will not authorize a divorce for adultery. Thus, where a witness testified that she went to the house of plaintiff, and knocked on the door for admission, which was denied, and upon walking around to the back of the house saw plaintiff, who was a negress, and a negro preacher; saw the preacher walk through the plaintiff's bedroom and out on the porch, but did not see them together in the bedroom; and another witness testified that upon the occasion of his visit to the place he saw a man whom he took to be a negro preacher, and that he "acted like he was at home," and that there was no other person on the place than plaintiff and the preacher, will not warrant a divorce on cross bill for adultery.⁴³ And in the same case, evidence that plaintiff, action being upon the cross bill, had the defendant arrested and attempted to place him under a peace bond, but upon trial failed to make out a case, and he was discharged, does not show such cruelty as will authorize a decree.

Where the only evidence in a case was that of plaintiff's mother, who testified: "I have heard the plaintiff's petition herein read. The allegations of fact set forth therein are true,

³⁹Roberson v. Roberson, 2 Posey Unrep. Cas. (Tex.) 451.

⁴⁰Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

⁴¹Rice v. Rice, 31 Tex. 174; Jernigan v. Jernigan, 37 Tex. 420; Erwin

v. Erwin (Tex. Civ. App.) 40 S. W. 53.

⁴²Haygood v. Haygood, 25 Tex. 576.

⁴³Burney v. Burney, 11 Tex. Civ. App. 174, 32 S. W. 328.

within my knowledge,"—and some of the facts could not have been known to the witness, there is not the full and satisfactory proof required.⁴⁴

§ 349. Parties as Witnesses; Their Admissions and Statements.

It is now provided that in divorce suits and proceedings "the husband and wife shall be competent witnesses for and against each other, but neither party shall be compelled to testify as to any matter that will criminate himself or herself. And where the husband or wife testifies, the court or jury trying the case shall determine the credibility of such witness, and the weight to be given such testimony; but no divorce shall be granted upon the evidence of either husband or wife if there be any collusion between them."⁴⁵ And the same amendment omits the inhibition against receiving the confessions and admissions of the parties. Prior to the amendment, neither party being a competent witness, their declarations as confessions or admissions were likewise excluded,⁴⁶ except in cases where a statement made by one of the spouses came within the rule of *res gestæ* of a transaction proper to be proved.⁴⁷ Under the present statute a divorce may be granted upon the sole testimony of one of the parties if there be no collusion. The provision that the court or jury trying the case shall determine the credibility of such witness and the weight to be given such testimony is no more than the rule in all cases, whether divorce or not.

§ 350. Collusion of Parties; Their Agreements, etc.

If the acts complained of as being ground for divorce were committed through the collusion of the parties, clearly they would not be entitled to a divorce for them. The statute says so much with reference to the crime of adultery, and the rule is not different with respect to other offenses. For if it appears

⁴⁴Murray v. Murray, 66 Tex. 207, 18 S. W. 506.

⁴⁵Acts 1897, p. 49, Sayles, Stat. art. 2979.

⁴⁶Stafford v. Stafford, 41 Tex. 111; Cornish v. Cornish, 56 Tex. 564; Endick v. Endick, 61 Tex. 559; Hanna

v. Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720.

⁴⁷McGowan v. McGowan, 52 Tex. 657; Huth v. Huth, 10 Tex. Civ. App. 184, 30 S. W. 240; Erwin v. Erwin (Tex. Civ. App.) 40 S. W. 53.

that there is any collusion between them with reference to the commission of the offense laid as the ground, it would be a fraud upon the court, and really no ground at all of which either could complain. But the statute further says that if it appears that there is collusion between them no divorce shall be granted upon the testimony of either. It is not clear that this means anything more than has just been explained; and, if not, is but a declaration of what the rule would otherwise be. The facts with reference to which collusion would defeat a recovery must be facts material to the disposition of the case; such as matters of jurisdiction or grounds, or a withholding from the court of facts which would defeat the particular grounds alleged for a decree. Agreements of parties with reference to the division of their common property, or the custody of their children, or the like, would not necessarily show collusion, nor probably tend to show it. The rule simply means that the parties must not collusively create grounds of divorce, nor do any act which would prevent a free and full inquiry by the court into the merits of the controversy between them. That a defendant is willing that a divorce be granted, or even anxious, does not evidence collusion. One might be willing to have a decree, yet not influence the court in awarding it. As said in a recent case,⁴⁸ "mere willingness to a judicial separation would not be collusion as to the granting of a divorce. If so, willingness might be evidenced by a failure to answer; and, willingness being collusion, the most effective way to meet divorce proceedings would be to ignore them. Collusion between the parties must relate to the causes assigned for divorce."

§ 351. Testimony of Particeps Criminis.

Bishop says the *particeps criminis* may, if willing to testify, be made a witness, but that his testimony must be received with caution, and corroborated;⁴⁹ Greenleaf, that he is an admissible witness, but his evidence is weak.⁵⁰ Our court quite early expressed a decided opinion that his testimony should not be admitted at all; and we append a portion of the language of the court in the belief that if it does not show such testimony to be

⁴⁸Erwin v. Erwin (Tex. Civ. App.)
40 S. W. 53.

⁴⁹Bish. Mar. & Div. 642.
⁵⁰Green, vol. 2 § 46.

tion of the court, it sometimes happens that the defendant is beyond the limits of the state, and hence citation must be had by publication,¹⁵ or by personal service with copy of the petition under article 1230 of the statute,¹⁶ as the proceeding is not altogether a proceeding *in personam*, but in the nature of a proceeding *in rem*, and this character of service sufficient to give the court jurisdiction.

§ 343. The Answer.

No defendant can be compelled to answer upon oath, nor will the allegations of the petition be taken as confessed for the want of an answer.¹⁷ This applies to the action for a divorce, and not to incidental questions involved, such as prayer for injunction, which might have to be under oath.¹⁸ The law encourages defenses to divorce suits, and the same strictness of pleading usually applicable to the defendant is not required here; ordinarily the question of venue, unless raised by proper plea in abatement, would be waived, but not so in divorce cases.¹⁹ The actual residence of plaintiff according to statute is jurisdictional, and cannot be waived. Nor is the right to defend dependent upon having filed an answer at all. The plaintiff in all cases is required to make full proof of the facts authorizing the maintenance of the suit, and the decree, independently of whether the defendant has answered or not. But a defendant failing to answer could not introduce affirmative proof and seek relief as upon a cross bill, not having so pleaded, but could introduce new and affirmative matter if such went in bar of the plaintiff's right to recover. Just how far a defendant would be permitted to introduce evidence in the absence of an answer has not been much discussed, but in view of the great liberality allowed in that respect, and the strictness required of the plaintiff in making his case, the court would doubtless allow great latitude, extending certainly to everything that would tend to disprove the plaintiff's case or bar a decree. *Bostwick v. Bostwick*, 73 Tex. 182, 11 S.

¹⁵Hare v. Hare, 10 Tex. 355.

¹⁶Trevino v. Trevino, 54 Tex. 261;
Bostwick v. Bostwick, 73 Tex. 182,
11 S. W. 178.

¹⁷Rev. Stat. art. 2979.

¹⁸Wright v. Wright, 3 Tex. 168.

¹⁹Bruner v. Bruner (Tex. Civ. App.) 43 S. W. 796.

W. 178, illustrates the liberal tendency of the courts. The plaintiff alleged that he was a bona fide resident of Harris county, Texas, and that defendant was a resident of New York. The defendant was personally served with citation in New York. She failed to answer on the first day of court, and a week later, no answer yet being filed, the court granted an *ex parte* trial, and decreed a divorce. On the same day, and before the decree was entered, the attorneys for the defendant appeared in court and asked that the order be set aside, tendering an answer, which, among other things, attacked the bona fides of plaintiff's allegations as to his residence, and asserted his bona fide residence to be in New York. Her sworn application for a continuance filed with the answer stated that she had a good defense which she could prove upon time being allowed her. The supreme court thought the trial court erred in not setting aside the decree and permitting the answer to be filed. Several matters are discussed, but the apparent reason for the holding is the liberality of the law in encouraging defenses to divorce suits, and in seizing upon the slightest error as an excuse for permitting them.

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tion alone to establish a valid marriage. The law will presume nothing concerning it in that connection, since there is no necessity for a presumption either for or against marriage. Divorce itself will be presumed after a considerable lapse of time, and especially where one's innocence of crime depends upon the existence of such divorce.²²

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ion of mutual guilt.' ”²⁵ If, however, the recrimination is light and insignificant as compared with the conduct of the defendant, a divorce may be granted. Where the wife petitioned for a divorce, and the testimony showed that, while the husband usually began the quarrels, she participated in them freely; and that, while he had begun the attack on one or two occasions, she had on another, by getting in the first blow, dealt him a “knock out,” and choked and bruised him, it was not thought that she was entitled to a decree.²⁶

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346. Condonation.

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²⁷Bish. Mar. & Div. 78.

²⁸Browne, Divorce, 80.

²⁹Ante, § 336.

vived and the impediment erected by the reconciliation is removed.³⁰

Reconciliation, technically called condonation, is not a perpetual bar save in cases of adultery where the complainant has admitted the offender into conjugal society or embraces after he or she knew of the criminal fact.³¹

The rule of condonation is less stringent when applied to women than to men; they are more ready to forgive and forget.³²

§ 347. Quantum of Proof Required.

“Full and satisfactory evidence” is the measure of the statute.³³ And first, the fact of residence for the prescribed time must be proved, for this is jurisdictional. Next, a valid subsisting marriage must be shown. This may be done by proof of general reputation,^{33'} cohabitation of parties, and general reception as man and wife; and this character of evidence may amount to the full and satisfactory evidence required.³⁴ The admission of the marriage in the defendant's answer will not dispense with the necessity of proving it.³⁵ Testimony that the parties lived together is not sufficient to show that they lived together as man and wife, and amount to a proof of marriage.³⁶ It can now never become necessary to resort to this character of evidence to prove the marriage. A peculiarity of trials of this character is, that the proof must be full and satisfactory to the court, even after the jury may have found the material allegations of the petition true. For the court is not bound to make the decree upon such finding, but, should it be of opinion the proof is not of that character, may nevertheless refuse to grant the decree.³⁷ It is not meant merely that the court must be satisfied of the sufficiency of the facts alleged, but of the evidence supporting them as well, independently of the verdict of the jury finding them true.³⁸ While the evidence ought to fully

³⁰Nogees v. Nogees, 7 Tex. 538;
Jones v. Jones, () Tex. 451.

³¹*Ante*, § 336.

³²Wright v. Wright, 6 Tex. 3.

³³Rev. Stat. art. 2979.

^{33'}Cunco v. De Cuneo (Tex. Civ. App.) 59 S. W. 284.

³⁴Wright v. Wright, 6 Tex. 3.

³⁵Simons v. Simons, 13 Tex. 468.

³⁶Belyew v. Belyew (Tex. Civ. App.) 32 S. W. 40.

³⁷Moore v. Moore, 22 Tex. 237.

³⁸Paulson v. Paulson (Tex. Civ. App.) 21 S. W. 778.

and conclusively establish the truth of the material allegations of the petition to the satisfaction of the court,³⁹ yet the action of the trial court is subject to review by the appellate court,⁴⁰ and in a proper case the decree may there be rendered;⁴¹ or the party dissatisfied should move in the trial court for a new trial and tender the additional testimony.⁴² The rule requiring full and satisfactory evidence, however, does not alter the ordinary rules of evidence so as to preclude the introduction of any character of evidence that is ordinarily admissible; it relates rather to the sufficiency of the evidence than to its evidentiary character.

§ 348. — Illustrations; Cases.

Evidence that only raises a suspicion of the fact will not authorize a divorce for adultery. Thus, where a witness testified that she went to the house of plaintiff, and knocked on the door for admission, which was denied, and upon walking around to the back of the house saw plaintiff, who was a negress, and a negro preacher; saw the preacher walk through the plaintiff's bedroom and out on the porch, but did not see them together in the bedroom; and another witness testified that upon the occasion of his visit to the place he saw a man whom he took to be a negro preacher, and that he "acted like he was at home," and that there was no other person on the place than plaintiff and the preacher, will not warrant a divorce on cross bill for adultery.⁴³ And in the same case, evidence that plaintiff, action being upon the cross bill, had the defendant arrested and attempted to place him under a peace bond, but upon trial failed to make out a case, and he was discharged, does not show such cruelty as will authorize a decree.

Where the only evidence in a case was that of plaintiff's mother, who testified: "I have heard the plaintiff's petition herein read. The allegations of fact set forth therein are true,

³⁹Roberson v. Roberson, 2 Posey Unrep. Cas. (Tex.) 451.

⁴⁰Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

⁴¹Rice v. Rice, 31 Tex. 174; Jernigan v. Jernigan, 37 Tex. 420; Erwin

v. Erwin (Tex. Civ. App.) 40 S. W. 53.

⁴²Haygood v. Haygood, 25 Tex. 576.

⁴³Burney v. Burney, 11 Tex. Civ. App. 174, 32 S. W. 328.

within my knowledge,"—and some of the facts could not have been known to the witness, there is not the full and satisfactory proof required.⁴⁴

§ 349. Parties as Witnesses; Their Admissions and Statements.

It is now provided that in divorce suits and proceedings "the husband and wife shall be competent witnesses for and against each other, but neither party shall be compelled to testify as to any matter that will criminate himself or herself. And where the husband or wife testifies, the court or jury trying the case shall determine the credibility of such witness, and the weight to be given such testimony; but no divorce shall be granted upon the evidence of either husband or wife if there be any collusion between them."⁴⁵ And the same amendment omits the inhibition against receiving the confessions and admissions of the parties. Prior to the amendment, neither party being a competent witness, their declarations as confessions or admissions were likewise excluded,⁴⁶ except in cases where a statement made by one of the spouses came within the rule of *res gestæ* of a transaction proper to be proved.⁴⁷ Under the present statute a divorce may be granted upon the sole testimony of one of the parties if there be no collusion. The provision that the court or jury trying the case shall determine the credibility of such witness and the weight to be given such testimony is no more than the rule in all cases, whether divorce or not.

§ 350. Collusion of Parties; Their Agreements, etc.

If the acts complained of as being ground for divorce were committed through the collusion of the parties, clearly they would not be entitled to a divorce for them. The statute says so much with reference to the crime of adultery, and the rule is not different with respect to other offenses. For if it appears

⁴⁴Murray v. Murray, 66 Tex. 207, 18 S. W. 506.

⁴⁵Acts 1897, p. 49, Sayles, Stat. art. 2979.

⁴⁶Stafford v. Stafford, 41 Tex. 111; Cornish v. Cornish, 56 Tex. 564; Endick v. Endick, 61 Tex. 559; Hanna

v. Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720.

⁴⁷McGowan v. McGowan, 52 Tex. 657; Huth v. Huth, 10 Tex. Civ. App. 184, 30 S. W. 240; Erwin v. Erwin (Tex. Civ. App.) 40 S. W. 53.

at there is any collusion between them with reference to the commission of the offense laid as the ground, it would be a fraud upon the court, and really no ground at all of which either could complain. But the statute further says that if it appears that there is collusion between them no divorce shall be granted upon the testimony of either. It is not clear that this means anything more than has just been explained; and, if not, is but a declaration of what the rule would otherwise be. The facts with reference to which collusion would defeat a recovery must be facts material to the disposition of the case; such as matters of jurisdiction or grounds, or a withholding from the court of facts which would defeat the particular grounds alleged for a decree. Agreements of parties with reference to the division of their common property, or the custody of their children, or the like, would not necessarily show collusion, nor probably tend to show

The rule simply means that the parties must not collusively create grounds of divorce, nor do any act which would prevent free and full inquiry by the court into the merits of the controversy between them. That a defendant is willing that a divorce be granted, or even anxious, does not evidence collusion. One might be willing to have a decree, yet not influence the court in awarding it. As said in a recent case,⁴⁸ "mere willingness to a judicial separation would not be collusion as to the granting of a divorce. If so, willingness might be evidenced by a failure to answer; and, willingness being collusion, the most effective way to meet divorce proceedings would be to ignore them. Collusion between the parties must relate to the uses assigned for divorce."

351. Testimony of Particeps Criminis.

Bishop says the *particeps criminis* may, if willing to testify, be made a witness, but that his testimony must be received with caution, and corroborated;⁴⁹ Greenleaf, that he is an admissible witness, but his evidence is weak.⁵⁰ Our court quite early expressed a decided opinion that his testimony should not be admitted at all; and we append a portion of the language of the court in the belief that if it does not show such testimony to be

⁴⁸Erwin v. Erwin (Tex. Civ. App.)
S. W. 53.

⁴⁹Bish. Mar. & Div. 642.
⁵⁰Green, vol. 2 § 46.

altogether inadmissible it at least calls attention to the extreme caution with which it should be received: "We are disposed to question the propriety and policy of the rule, even admitting the paramour to the witness stand, under the brand of infamy, as Professor Greenleaf's rule admits him. The question has not been viewed in all of its tendencies. He is only viewed as a *particeps criminis*, ready to swear to his own guilt; and if we were certain that such witness would be only called on when there was in truth guilt, it might well be allowed them to swear with the express understanding that their evidence was weak, and, without corroboration, would be insufficient to establish the fact of guilt. But we have reason to believe that such testimony would be often offered when there had been no guilt committed. We will suppose that when this witness is put upon the stand to prove the fact, if it is in his power to answer truthfully in the affirmative, the temptation to one who had a single spark of generous, manly, chivalric feeling to woman in his bosom would be so strong to screen and protect the guilty fair one that there would be imminent danger of his being driven to the commission of perjury. He would be further induced to adopt this alternative from a knowledge of the fact that if he answered in the affirmative he thereby fixed on himself the indelible seal of infamy that would exclude him from the companionship of all men of honorable feeling. But suppose he was to refuse to answer upon the ground that he could not do so without criminating himself, although by doing so he could prevent a conviction of guilt, yet the female, by his silence, would have, in the opinion of the public, the seal of condemnation fixed on her reputation, never to be effaced. And this would be the result even if she was in truth innocent, and the witness to play the part for which he was called, by an unkind and inhuman husband, to destroy the reputation of his innocent wife, by the witness standing mute when questioned, when if he had answered with truth he could not have said anything against her innocence. . . . We believe that policy forbids his being sworn at all, in such cases, when the prospect of advancing the truth falls infinitely short of the evil that would be most likely to result from his swearing at all."⁵¹

⁵¹Simons v. Simons, 13 Tex. 468.

CHAPTER XXVII.

DIVORCE; THE DECREE, ITS SCOPE, EFFECT, AND FINALITY.

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| § 352. Is from Bonds of Matrimony,
Generally. | § 357. Alimony. |
| § 353. Should Settle Property Rights. | § 358. Costs. |
| § 354. — Community Property and
Debts. | § 359. Custody of Children. |
| § 355. — Homestead. | § 360. — Conclusiveness of Award. |
| § 356. Devesting Title to Real Es-
tate. | § 361. Finality of Divorce Decrees.
Generally. |
| | § 362. Decrees of Other Jurisdic-
tions. |

§ 352. Is from Bonds of Matrimony, Generally.

The divorce *a mensa et thoro* is unknown to our law. Whether the decree be for an impediment rendering void the marriage, or for cause arising subsequent to the celebration, the result is the same,—a dissolution of the marriage relation. Technically there may be a distinction, but if so any discussion of it would be unprofitable. The decree from the bonds of matrimony does not render illegitimate the children born of the marriage, and either party may marry again.¹ The court may, in its discretion, upon final decree change the name of either party upon his or her application therefor.² The purpose of the decree is to not only sever the marriage relation between them, but to completely adjust all their mutual rights and liabilities, making suitable provisions for the children of the union if there be any; but it is not mandatory that the court should adjudge these property rights, custody of children, and the like, for these may be left for subsequent adjudication; for, as in all other character

¹Rev. Stat. art. 2982.

²Ibid. art. 380.

of cases, the decree only determines such questions as are properly before the court for adjudication.³

The statute seems to contemplate that the form of the judgment, whether of the court or based upon the findings of a jury, should find the material allegations of the petition true. It is doubtful if a general finding in favor of the plaintiff, with a general order decreeing a dissolution of the marriage, will meet the requirement of the statute in this particular. It has been held that, where the cause is submitted to a jury on special issues, the questions of residence of the plaintiff and valid marriage of the parties must be submitted and found by them, even where the answer of defendant admitted the marriage;⁴ and the statute prescribes that where no jury has been demanded the decree shall be rendered "upon the judgment of the court affirming the material facts alleged in the petition."⁵

If the proof fails, the practice seems to be to dismiss without prejudice,⁶ or the plaintiff may move for a new trial if additional evidence is to be had.⁷

§ 353. Should Settle Property Rights.

Upon rendering the decree the court is authorized to decree a division of the estate of the parties in such way as shall seem right and just, having proper regard to the rights of each and their children, if any, subject to the limitation noticed hereafter, that neither party may be compelled to divest himself or herself of the title to real estate.⁸ This applies to such property only as is owned in whole or in part by the parties, and not to that held merely in trust for another.⁹ And, of course, to such property only as is situated within this state, as the court would have no power to determine the status of property situated elsewhere.¹⁰ Ordinarily the proper division of property is that each one take one half the community estate, bearing each his

³Whetstone v. Coffey, 48 Tex. 269; Harvey v. Cummings, 68 Tex. 599, 5 S. W. 513; Gray v. Thomas, 83 Tex. 246, 18 S. W. 721.

⁴Bruner v. Bruner (Tex. Civ. App.) 43 S. W. 796.

⁵Rev. Stat. art. 2979.

⁶Moore v. Moore, 22 Tex. 237.

⁷Haygood v. Haygood, 25 Tex. 576.

⁸Rev. Stat. art. 2980.

⁹Jones v. Jones (Tex. Civ. App.) 41 S. W. 413.

¹⁰Moor v. Moor (Tex. Civ. App.) 57 S. W. 999.

just proportion of the community debts, and retain his separate property. But where there are equities to be adjusted, or children to be provided for, a different division may be ordered.¹¹ In a proper case the court may even take the property, both community and separate, entirely from the possession of the parties, and place it with a trustee to be administered in accordance with the directions of the court, for the benefit of all the parties interested.¹² Much is necessarily left to the discretion of the court. No set rules can be prescribed. The exigencies and emergencies of each particular case will have much to do with the disposition of the property of the union, and even of the spouses. If the power be abused,¹³ it is, of course, subject to review in a proper way.¹⁴ But little controversy has ever arisen with respect to the duty of the court to set apart to each individual his separate property. In an early case,¹⁵ upon a decree of divorce it appeared that all the property owned by the parties was the separate property of the wife, it all having been conveyed to her by the husband as a gift. The parties were old, and the husband had no property or means. The court placed the separate property of the wife in the hands of a trustee or receiver for the benefit of the husband as well as the wife, as a proper exercise of its equity powers in such a case. Other persons who are asserting rights in the property may be made parties to the divorce proceeding.¹⁶

§ 354. — Community Property and Debts.

The discretion committed to the trial court in this respect authorizes it to set apart to the wife her interest in the community free from any debt or charge against the community, where the husband's separate estate and his interest in the community largely exceed such debts, and the wife has no other property;¹⁷ that is, in the division the husband may be required to pay such debts, for, of course, creditors have prior claims over either of the spouses, and the court would have no authority to set apart

¹¹Trimble v. Trimble, 15 Tex. 18.

¹²Rice v. Rice, 21 Tex. 58.

¹³Craig v. Craig, 31 Tex. 203.

¹⁴Simons v. Simons, 23 Tex. 344.

¹⁵Fitts v. Fitts, 14 Tex. 443.

M. W.—27.

¹⁶Woeltz v. Woeltz (Tex. Civ. App.) 57 S. W. 905.

¹⁷Hubbard v. Hubbard (Tex. Civ. App.) 38 S. W. 388.

community property to the wife free from such debts if it were otherwise liable.¹⁸ And in casting up the account between them, where there is no special reason for making an unequal division of the community, the husband should have credit for amounts expended for taxes and other necessary expenses of the community. He should be charged for profits received by way of rents upon the community property, but not for the rents of the residence or business homestead occupied by himself. Until the disposition of the property by the court he is entitled to this use.¹⁹ The court should hear evidence, based upon a proper pleading, as to the property rights of the parties, and not refer the same to commissioners appointed to partition the property, and who have no authority to hear evidence and determine property rights.²⁰ And when a partition is decreed a lien may be adjudged against the portion set apart to the one or the other as the equities may require.²¹ Where no disposition of the community is made at the time of the decree, the divorced parties become tenants in common therein,²² and a separate action may be brought for a partition thereof. In such action the property found in the possession of the parties at the dissolution of the marriage is presumptively community, and the recitation in the deeds to a portion of the same that such property was the separate property of the husband, is overcome by proof that he so commingled his own with the community property as to be unable to trace and identify any of the property as having been purchased either in whole or in part with his means.²³

§ 355. — Homestead.

The power of the court to make division of the property extends to the homestead as well as any other. If it be community property partition may be ordered where that can be done,²⁴ or

¹⁸Grandjean v. Runke (Tex. Civ. App.) 39 S. W. 915.

¹⁹Stone v. Stone (Tex. Civ. App.) 40 S. W. 1022.

²⁰Bohan v. Bohan (Tex. Civ. App.) 56 S. W. 959.

²¹Boyd v. Ghent (Tex. Civ. App.) 53 S. W. 704.

²²Southwestern Mfg. Co. v. Swan (Tex. Civ. App.) 43 S. W. 813.

²³Moor v. Moor (Tex. Civ. App.) 57 S. W. 992.

²⁴Zapp v. Strohmeyer, 75 Tex. 638, 13 S. W. 9.

its sale and division of proceeds where partition cannot be made.²⁵ And the court may, in a proper case, set aside the homestead to the wife's separate use, for a limited time, even where the same is the separate property of the husband; but its continuance as a homestead in law will depend upon the character of its use from the date of the decree, and not upon the attempt of the court in setting it aside to fix upon it a homestead character.²⁶ If no disposition of the community homestead be made in the decree, as in other community property the parties become tenants in common therein,²⁷ and either may have a homestead in his interest in such property if the uses make it such.²⁸

§ 356. Devesting Title to Real Estate.

The statute authorizing a division of the property of the parties provides specially that nothing therein contained "shall be construed to compel either party to divest himself or herself of the title to real estate."²⁹ This evidently has reference only to the separate real estate of the spouses, since otherwise it would render nugatory the express provision that the court may decree and order a division of the estate of the parties. To make any division whatever of the community estate between the parties is in a sense to divest each of his title and interest in that portion set apart to the other. Yet it has been held that such a transaction did not fall within the inhibition of the statute.³⁰ Nor is setting apart of the community to a trustee for a limited time for the maintenance of the minor children,³¹ or of the wife's separate estate for the benefit of the husband and wife,³² divesting the owners of such property of their title under the statute. And the supreme court has sanctioned a partition of the community homestead, and its sale and division of proceeds,³³

²⁵Trigg v. Trigg (Tex.) 18 S. W. 313.

²⁶Bahn v. Starcke, 89 Tex. 203, 34 S. W. 103.

²⁷Kirkwood v. Domnau, 80 Tex. 645, 16 S. W. 428.

²⁸Southwestern Mfg. Co. v. Swan

(Tex. Civ. App.) 43 S. W. 813.

²⁹Rev. Stat. art. 2980.

³⁰Young v. Young (Tex. Civ. App.) 23 S. W. 83.

³¹Rice v. Rice, 21 Tex. 58.

³²Fitts v. Fitts, 14 Tex. 443.

³³See *ante*, § 355.

that on final account between husband and wife he should have credit for money paid her under an order of court allowing alimony.⁴⁰ This does not comport with the theory upon which alimony is allowed. It is granted where the wife has no sufficient income herself, upon the recognized liability of the husband for her support. He is thus compelled to supply that which he might otherwise withhold, during the pendency of such a proceeding. It is for her temporary support. It is his duty to support her as long as she is his wife, and he should not be permitted to charge her for it. But where, as in the case mentioned, the amount is offset against the community received by him, it is proper to allow him such credit. But to charge the wife individually is to presume the separation to be upon her fault, while to charge the husband, or the community, which is really the primary fund out of which her support should come, is to presume nothing. A court may sometimes make an order for the payment to the wife of money more as a settlement of property rights than as alimony in its strict sense,⁴¹ and in that sort of case a different rule would, of course, apply, and the wife should be charged individually with such advance payment. The statute does not authorize an allowance of alimony to the husband; and, in the absence of such a statute, the court could not make such an order,⁴² for it is not the duty of the wife to support the husband, and the order for alimony is nothing more than the judicial sanction and enforcement, under abnormal conditions, through the judiciary, of the duty of the husband to support his wife.⁴³ The order is enforced by the issuance of an execution, or the imprisonment for contempt in case of a wilful disregard.⁴⁴ And such claim is not technically a debt, so as to constitute such confinement an imprisonment for debt.⁴⁵

§ 358. Costs.

"The court may award costs to the party in whose behalf the

⁴⁰Stone v. Stone (Tex. Civ. App.)

10 S. W. 1022.

⁴¹Wiley v. Wiley, 33 Tex. 358.

⁴²Groth v. Groth, 69 Ill. App. 68.

⁴³State ex rel. Huber v. King, 49

La. Ann. 1503, 22 So. 887.

⁴⁴Ex parte Todd, 119 Cal. 57, 50

Pac. 1071; Tolman v. Leonard, 6 App. D. C. 224.

⁴⁵State ex rel. Huber v. King, 49

La. Ann. 1503, 22 So. 887.

sentence or decree shall pass, or that each party shall pay his or her own costs, as to the court shall appear reasonable.”⁴⁶ While some latitude is allowed the court,⁴⁷ yet, unless it is a case appealing to the discretion of the court, the party prevailing is ordinarily entitled to his costs.⁴⁸ These costs may be adjudged to be a lien against the portion of the property set apart to the party charged with them, which lien will be superior to the claims of purchasers or lienees whose rights accrued subsequent to the filing of the suit.⁴⁹ The wife’s attorney’s fees are not properly costs of the suit, but she may recover them in a proper case.⁵⁰

§ 359. Custody of Children.

The court may give the custody and education of the children to either party as may seem proper, having proper regard to the prudence and ability of the parents, and the age and sex of the child or children. The parent desiring such custody should apply for the same, and the court may make any order that the safety and well being of such child or children may require.⁵¹ So far we have discussed the rules applicable to the controversy between the parents, but here the controversy is not between them alone, but infinitely superior to their wishes in the matter is the welfare of the children themselves. The parent is considered only in a secondary sense. Their prudence and ability are regarded in determining the best interest of the children.⁵² And unless the discretionary power of the court has been abused, its award in this respect will not be disturbed on appeal.⁵³ If neither party is a fit person to have the custody, then the court is not without power, and it is its duty, to place such children in the care of some other person more suited to the charge. The good of the children, which is the highest consideration, may require such removal. The claim of the

⁴⁶Rev. Stat. art. 2988.

⁴⁷Withee v. Withee, 50 Tex. 327.

⁴⁸Stone v. Stone (Tex. Civ. App.) 40 S. W. 1022.

⁴⁹Ghent v. Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891; Boyd v. Ghent (Tex. Civ. App.) 53 S. W. 704.

⁵⁰See *ante*, § 66.

⁵¹Rev. Stat. art. 2987.

⁵²Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90.

⁵³Norris v. Norris (Tex. Civ. App.) 46 S. W. 405.

parent is not superior to the interests of the children and the public.⁵⁴ And, placing them with another than the parent, it may further set apart the property, whether community or separate, or so much as may be necessary, for their support and education.⁵⁵ But such provision for the support of the children, whether the custody be given to one of the parents or to another than the parents, should be with reference to the property of the parents, and not by way of charge in gross sum, or periodical payments of money, having no regard to such property or the earning capacity of the parent charged. The statute confers ample power upon the court to protect the interest of the children in the partition of the property of the parents, for it is provided that due regard must be had to the rights of the children,⁵⁶ and upon reason this is the only way the court should provide for them. No order of the court can affect the father's liability for the support of his minor children, and it would be improper for it to attempt to fix that liability in any stated amount.⁵⁷ If the court attempts to provide for the support of children by an allowance against the husband, the judgment may be enforced by execution only, since such decree creates a debt against him, for default in which imprisonment for contempt would be improper and in violation of the Bill of Rights.⁵⁸

§ 360. — Conclusiveness of Award.

Nor can the award when thus made be attacked by any other method than is required in other judgments which are sought to be set aside; that is, by direct proceeding for that purpose. The general power conferred upon county courts to appoint guardians exists only after the death of one or both the parents, and that court has no authority to appoint a guardian at all where

⁵⁴Rice v. Rice, 21 Tex. 58.

⁵⁷Defec v. Defee (Tex. Civ. App.)

⁵⁵Rev. Stat. art. 2980; Fitts v. Fitts, 14 Tex. 443; Trimble v. Trimble, 15 Tex. 18; Simons v. Simons, 23 Tex. 344.

51 S. W. 274.

⁵⁶*Ex parte* Ellis, 37 Tex. Crim. Rep. 539, 40 S. W. 275; *Ex parte* Gerrish (Tex. Crim. App.) 57 S. W.

⁵⁸Pape v. Pape, 13 Tex. Civ. App. 99, 35 S. W. 479.

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the custody of the minor has been duly awarded in a divorce proceeding. The statute authorizing such award—the proper parties being before the court—its full jurisdiction attaches, and its orders have all the force and finality of judgments in other cases.⁵⁹ But if upon a direct application to vacate such award it appeared that the safety and well being of the child or children—for this is the prime consideration of the court—demanded its reversal, the court ought not to hesitate to commit the custody to a different person. And good reason suggests that a judgment awarding the custody of a child ought never to be final in the sense that such decree cannot be changed when the child's interest demands it, whether the causes calling for the change existed at the time of the award, or have arisen subsequently. But due regard for the constituted courts of the country would probably require the application to be made in the court where the award was made.

§ 361. Finality of Divorce Decrees, Generally.

The decree of divorce, where the court has jurisdiction of the parties, is final and binding upon them until set aside, reversed, or vacated in some one of the ways authorized by law. That the judgment is irregular or erroneous is immaterial; but, emanating from a proper court having jurisdiction of the parties, it is a valid sentence until vacated. But a decree without service of citation upon defendant or his voluntary appearance is unauthorized, and will be set aside,⁶⁰ and is, moreover, absolutely void, requiring no judicial determination of its invalidity. We have said that an erroneous decree would be binding upon the parties, or valid, until reversed or vacated. This is true, theoretically, but should the decree be reversed or vacated, it is void *ab initio*,⁶¹ and the marriage relation cannot be said to be finally dissolved until such time after decree as no appeal or error can be taken.

If the decree does not consider the property rights of the par-

⁵⁹Jordan v. Jordan, 4 Tex. Civ. App. 559, 23 S. W. 531.

⁶⁰Gebhard v. Gebhard, 25 Misc. 1, 54 N. Y. Supp. 406.

⁶¹Stephens v. Stephens, 62 Tex. 337.

tics, the same are unaffected by it, and may be asserted anywhere and any time occasion may arise. If it purports to adjust all their property rights it is binding in this respect until set aside for fraud, as may be done in other judgments,⁶² or by appeal, or error, and the like. But the decree is binding only with reference to such property as is brought within the jurisdiction of the court⁶³ and the scope of its adjudication. If property were by either omitted from such consideration, it might authorize the opening of the decree as to the property, or a separate suit with reference to it, as the divorce judgment could not be an adjudication of their rights in property not considered by the court.⁶⁴

§ 362. Decrees of Other Jurisdictions.

A decree of divorce, like other judgments *in rem*, has extra-territorial force. The marriage of parties creates a new status recognized, not only in the country where celebrated, but in all countries; so, a divorce in accordance with the laws of the country where obtained destroys that status, and it no longer exists in any country. It can make no difference that the marriage was not celebrated in accordance with our laws; if it was legal where consummated, it there created the legal marital status, and so it will when the parties remove to any other state; so, it cannot matter that a dissolution was decreed for a cause that would not authorize a decree here. The validity of the marriage, and the power to dissolve it, are determined by the laws of the country where solemnized in the one instance, and dissolved in the other. But a judgment of any court to have force at home or abroad must be rendered by a court having jurisdiction; for the decree of any court having jurisdiction over neither of the parties is a nullity, and may be collaterally attacked in any proceeding.⁶⁵ It is universally held that since every state has a right to determine the status of its citizens, jurisdiction for that purpose may be had where one of the parties has a bona fide residence within

⁶²McMurray v. McMurray, 78 Tex. 581, 14 S. W. 895, S. C. 67 Tex. 665, 4 S. W. 357.

⁶³Moor v. Moor (Tex. Civ. App.) 57 S. W. 992.

⁶⁴Gray v. Thomas, 83 Tex. 246, 18 S. W. 721.

⁶⁵Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154.

the jurisdiction. But the decree cannot go one step further than to dissolve the marriage relation, where the defendant nonresident makes no voluntary appearance in the case, thereby submitting himself to that jurisdiction. The court cannot adjudicate any rights further than as above indicated.⁶⁶

⁶⁶See *Henry v. Forshee*, 84 Tex. 185, 19 S. W. 381.

CHAPTER XXVIII.

DEATH OF HUSBAND OR WIFE.

363. Descent of Property; Statute. § 365. — and of the Homestead.
364. — Further of the Community
Property.

363. Descent of Property; Statute.

“Where any person having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: 1. If the deceased leave a child or children, or their descendants, the surviving husband or wife shall take one third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one third of the land of the intestate, with remainder to the child or children of the intestate and their descendants. 2. If the deceased have no child, or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and one half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased have neither surviving father nor mother, nor surviving brothers and sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate.”¹

“There shall be no distinction in regulating the descent and distribution of the estate of a person dying intestate between

¹Rev. Stat. art. 1689.

property which may have been derived by gift, devise, or descent from the father, and that which may have been derived by gift, devise, or descent from the mother; and all the estate to which such intestate may have had title at the time of death shall descend and vest in the heirs of such person in the same manner as if he had been the original purchaser thereof; provided, however, that if such intestate was the legally adopted heir of another, and dies, leaving no surviving husband or wife and no children, then so much of his estate as was obtained by gift, devise, or descent from the person adopting him shall descend to the person and his heirs who adopted such intestate."²

Prior to the statute, and while the civil law of Spain applied, the widow, if she did not possess sufficient means to live with the comfort to which she was accustomed, was entitled to one-fourth part of the estate of her deceased husband, provided it did not exceed a specified amount; but this right was forfeited upon her contracting another marriage.³ If no children or their descendants survive, the surviving husband or wife takes the absolute title to the entire personal estate, and one half of the real estate,⁴ of the intestate, irrespective of how the intestate acquired such property; whether by purchase, gift, devise, or descent; where children also survive, or their descendants, the surviving husband or wife takes absolutely a one third of the personalty, and a life estate in one third of the lands of the intestate, and the children and surviving husband or wife become tenants in common in such property until partitioned, and although as against the surviving husband or wife the children are not entitled to the possession of such one third during the life of the surviving husband or wife, they may yet sue and recover it from a stranger or trespasser.⁵ But neither cotenant can charge the other for improvements placed upon the property without the consent of the one sought to be charged.⁶ The heirs, of course, take the property subject to the debts of the deceased, but are not liable personally beyond the amount of the property received

²Ibid. art. 1690.

³Schmidt's Civil Law, 270.

⁴House v. Brent, 69 Tex. 27, 7 S. W. 65.

⁵McConnico v. Thompson, 19 Tex. Civ. App. 539, 47 S. W. 537.

⁶Calhoun v. Stark, 13 Tex. Civ. App. 60, 35 S. W. 410.

them;⁷ and it may be well to here add that the personal property of the deceased is the primary fund out of which the debts of the decedent are to be paid, rather than from the realty;⁸ so that the right of the surviving wife to the personalty is subject to its liability to be taken for such debts even where they are cured by a lien upon the real estate, and although the effect of charging the personal property is to make the wife pay such debts out of the personal property that would otherwise go to her individually, and to allow the real property to pass to her and the other heirs of the deceased in moieties.⁹

While the right to assert the interest thus inherited may become barred, it is not barred by our statute of three years by the occupancy and adverse possession of the surviving children against the surviving wife, since their possession is supported by neither title nor color of title.¹⁰

One convicted and sentenced to a life imprisonment in the penitentiary is not "dead," within the meaning of the statute, and his property does not upon such conviction descend and vest in his heirs.¹¹

364. — Further of the Community Property.

"Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased, or descendants of such child or children, then the survivor shall be entitled to one half of said property, and the other half shall pass to such child or children or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit could be entitled to if alive."¹² "In every case the community estate passes charged with the debts against it."¹³ Children born

⁷Blinn v. McDonald, 92 Tex. 604, 18 S. W. 787, 48 S. W. 571, 50 S. W. 11.

⁸Arnold v. Dean, 61 Tex. 253. But see Wenar v. Stenzel, 48 Tex. 484.

⁹Minter v. Burnett, 90 Tex. 245. 38 S. W. 350.

¹⁰Cockrell v. Curtis, 83 Tex. 105, 18 S. W. 436.

¹¹Davis v. Laning, 85 Tex. 39, 18 L. R. A. 82, 19 S. W. 846.

¹²Rev. Stat. art. 1696.

¹³Ibid. art. 1697.

to parents before their marriage, if recognized by the husband, as well also as those born of marriages deemed null in law, nevertheless inherit.¹⁴

“Descendants” of the children did not inherit after the act of March, 1848, and prior to March 30, 1887, for between those dates the statute used only the words “child or children,” and not the words “or their descendants,” and consequently under that statute, if a husband or wife died leaving surviving no children, but grandchildren, the surviving husband or wife took the entire estate to the exclusion of the grandchildren, since they were not included within the words “child or children.”¹⁵ The statute makes no distinction between personal and real property, and the inheritance passes to all the children of a decedent whether of the then existing marriage or of a former one.¹⁶ The right to take by inheritance as heir of the marital union is not a “marital right” within the meaning of the act of January 20, 1840, defining marital rights, and declaring that the “marital rights” of parties married elsewhere and removed to this state before the passage of the act should be governed by the law as it was previously, but our statute regulates the matter.¹⁷ The heirs taking the community, as also the separate, property of decedent, as to that, may not, for reasons stated in the next section, be entitled to a partition of the same, but, aside from the homestead rights of the surviving members of the family, may ordinarily have partition. The property thus inherited at once becomes liable for the heirs’ debts, with the creditor entitled to a partition only when the heir would be.¹⁸ The rights of the heirs to their distributive share of their mother’s estate are not affected by the act of their father’s administrator, as his inventory,¹⁹ or sale,²⁰ unless it be made to pay community debts, and

¹⁴Ibid. art. 1699.

¹⁵Burgess v. Hargrove, 64 Tex. 110; Cartwright v. Moore, 66 Tex. 55, 1 S. W. 263; McKinney v. Moore, 73 Tex. 470, 11 S. W. 493; Stephens v. Shaw, 68 Tex. 261, 4 S. W. 458; Pegues v. Haden, 76 Tex. 94, 13 S. W. 171; McCown v. Owens, 15 Tex. Civ. App. 346, 40 S. W. 336.

¹⁶Morrill v. Hopkins, 36 Tex. 687.

¹⁷McCown v. Owens, 15 Tex. Civ. App. 346, 40 S. W. 336.

¹⁸Harris v. Seinsheimer, 67 Tex. 356, 3 S. W. 307.

¹⁹McCord v. Holloman (Tex. Civ. App.) 46 S. W. 114.

²⁰Roy v. Whitaker, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367.

is attempted conveyance, even upon the order of the probate court, will not give to the purchaser title or color of title so as to support the plea of three years' limitation.²¹

And while it is the rule that only those who are legally husband and wife are entitled to inherit from each other, it must not be understood to exclude those marriages which, though lacking in some matter of regularity, are nevertheless good as common-law marriages, for we have seen that such marriages are recognized with us, and that civil effects flow from them as though they were in all respects regular.²² But such marriages, to be good as common-law marriages, must have been contracted in good faith by the party seeking the benefits of the same, and not upon a knowledge that the same could not be lawful; as where a woman marries knowing that she has a lawful husband living or the man whom she marries has a lawful wife living; where she could not claim the rights of a wife;²³ but if ignorant of all impediment, she might, for equitable reasons, be entitled to share the joint earnings of such union, toward which the true wife in no manner contributed.²⁴ While upon the death of the wife her interest in the community descends and vests immediately in her heirs, it will not have the effect of dissolving a partnership of which her husband is a member and in which such community property is invested. The firm will become liable to the children as a trustee if it uses their property.²⁵

§ 365. — and of the Homestead.

“On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the

²¹Arnold v. Hodge, 20 Tex. Civ. App. 211, 49 S. W. 714.

²²Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154.

²³Chapman v. Chapman, 16 Tex. Civ. App. 382, 41 S. W. 533.

²⁴Ante, § 178.

²⁵Simpson v. Gregg, 1 Posey Unrep. Cas. (Tex.) 380.

same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted under the order of the proper court having the jurisdiction to use and occupy the same."²⁶ "When the widow dies or sells her interest in the homestead, or elects to no longer use or occupy the same as a homestead, and when the proper court no longer permits the guardian of the minor children to use and occupy the same as a homestead, it may be partitioned among the respective owners thereof in like manner as other property held in common."²⁷ And the homestead rights of the widow and children of the deceased are the same whether the homestead be the separate property of the deceased or the community property of himself and surviving wife, and the respective interests of such surviving wife and children shall be the same in one case as in the other.²⁸ This reservation to the surviving husband or wife is only for such time as he or she sees fit to use or occupy the property as a homestead, for, upon abandoning or otherwise ceasing to so use it, it at once becomes subject to partition between those rightfully owning it.²⁹ So, too, when the proper court no longer permits the guardian of the minor children to occupy the same, it may be partitioned. His occupancy, too, must be by authority of an order from the proper court, not a mere voluntary occupancy or use without such sanction.³⁰ The inhibition against partitioning the homestead has existed only since the adoption of the Constitution of 1876; prior to that time it could be properly partitioned among the respective owners where it was not, by reason of the insolvency of the estate, set apart to the widow under the statute.³¹ We will hereafter discuss more fully the nature and extent of the homestead rights of the surviving constituents of the family, and suffice it to here say that, subject only to those rights, the homestead, whether separate or community property, passes, and vests precisely the same as other like prop-

²⁶Const. art. 16, § 52; Rev. Stat. arts. 2057, 2062.

²⁷Rev. Stat. art. 2058.

²⁸Ibid. art. 2059.

²⁹Gaines v. Gaines, 4 Tex. Civ. App. 408, 23 S. W. 465; Sanburn v.

Deal, 3 Tex. Civ. App. 385, 22 S. W. 192.

³⁰Gaines v. Gaines, 4 Tex. Civ. App. 408, 23 S. W. 465.

³¹Clemons v. Clemons, 92 Tex. 66, 45 S. W. 996.

ned by the deceased.³² This does not mean, however, the homestead descends, charged with debts of the deceased, nonexempt property, for such is not the case.³³ The tion of the homestead from partition among the heirs is re in favor of the surviving husband as where the wife s,³⁴ even though there be no children of the marriage.³⁵ inhibition against partition applies not only to the home- self for the time mentioned by the statute, but to the al- e in lieu thereof when one is made,³⁶ and probably to the s of an insurance policy thereon, taken out for the pro- of the owners, for such time as will reasonably enable er to again build and reoccupy the property.³⁷ The le is that such proceeds stand in lieu of the property in- and is the same as that discussed in § 269.

Brown v. Reed, 20 Tex. Civ. App. 74, 48 S. W. 537, cer- irs of a deceased wife sued the surviving husband in tres- try title and for partition of a tract of land occupied by urviving husband as a homestead both before and after th of his wife; the defendants did not dispute the plain- tle to one half of the land, but denied that they were tres- , and pleaded their homestead rights in the property; not ntitled to a partition, it was held that the proper judg- as for the defendants, and that no judgment establishing F's title should be entered.³⁸

ht v. Doherty, 50 Tex. 34;
Goins (Tex. Civ. App.) 23
3; West v. West, 9 Tex. Civ.
i, 29 S. W. 242; Crocker v.
19 Tex. Civ. App. 296, 46
0; Her. Prob. Guide, 303,

v. Sims, 93 Tex. 586, 57 S.

v. Hollingsworth (Tex. Civ.
; S. W. 881; Magee v. Rice,
483.
N.—28.

³²*Brown v. Reed*, 20 Tex. Civ. App.
74, 48 S. W. 537.

³³*Post*, 371; Rev. Stat. art. 2054.

³⁴*Culbertson v. Cox*, 29 Minn. 309,
13 N. W. 177, cited in *Swayne v.*
Chase (Tex. Civ. App.) 29 S. W.
420.

³⁵For further discussion of home-
stead rights of survivors, see *post*,
§§ 371 *et seq.*

CHAPTER XXIX.

SAME CONTINUED; ADMINISTRATION.

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| § 366. Administration Generally; Statute. | § 376. — Nature of Survivor's Holding. |
| § 367. Allowance to Widow and Minor Children; Statute. | § 377. — Paying Community Debts. |
| § 368. — the Order. | § 378. — Sales by Survivor. |
| § 369. — Persons Entitled to, and When. | § 379. — Exemptions. |
| § 370. — Taking Property in Payment. | § 380. — What, then, are Assets of the Estate? |
| § 371. Setting Apart Homestead and Other Exempt Property; Allowance in Lieu; Statutes. | § 381. — Power of Survivor to Sell the Homestead. |
| § 372. — Nature and Extent of These Rights. | § 382. Liens. |
| § 373. — Further of the Homestead and Allowance in Lieu thereof. | § 383. Suits By and Against Survivor. |
| § 374. Same Subject Continued. | § 384. Individual Liability of Survivor and Suits on Bond. |
| § 375. Administration of Community Property; Statutes. | § 385. Defective and Irregular Proceedings. |
| | § 386. Joint Administrations. |
| | § 387. Closing up of Community Administration; Distribution. |

§ 366. Administration Generally; Statute.

Upon the death of the husband or wife no administration will be granted unless it appears to the court that there exists a necessity therefor; but such necessity appearing, the court will grant letters testamentary or of administration, giving preference first to the person named as executor in the will of the deceased, and second to the surviving husband or wife, and then to others. It makes no difference that the surviving husband or wife is under twenty-one years of age.¹ The surviving husband or wife may in open court or by power of attorney, duly authen-

¹Rev. Stat. arts. 1910, 1913, 1914.

ticated and filed with the clerk of the county court of the county having jurisdiction of the estate, renounce his right to the administration in favor of some other qualified person, and thereupon the court may grant letters to such other person.² But where letters have been granted to one, and another, whose right thereto is prior, and who has not waived such right, and who is not disqualified, makes application for letters, the letters previously granted will be revoked and other letters granted to such person thus entitled.³

§ 367. Allowance to Widow and Minor Children; Statute.

At the first regular term of the court after the original grant of letters testamentary or of administration, or at any subsequent term thereafter, within twelve months after the grant of such original letters, it shall be the duty of the court to fix the amount of an allowance for the support of the widow and minor children of the deceased.⁴ Such allowance shall be of an amount sufficient for the maintenance of such widow and minor children for the term of one year from the time of the death of the testator or intestate, and such allowance to be fixed with regard to the facts existing during the first year after the death of such testator or intestate; provided, that in no case shall such allowance exceed \$1,000.⁵ No such allowance shall be made for the widow when she has separate property adequate to her maintenance; nor such allowance be made for the minor children when they have property in their own right adequate to their maintenance.⁶ When an allowance has been fixed, an order shall be entered upon the minutes stating the amount thereof, and directing the executor or administrator to pay the same in accordance with law.⁷ The executor or administrator shall pay such allowance: (1) To the widow, if there be one, for the use of herself and the minor children if such children be hers; (2) if the widow is not the mother of such minor children, or of some of them, the portion of such allowance necessary for the support of such minor child or children of which she is not the

²Ibid. art. 1916.

³Ibid. art. 1917.

⁴Rev. Stat. art. 2037.

⁵Ibid. art. 2038.

⁶Ibid. art. 2039.

⁷Ibid. art. 2040.

mother shall be paid to the guardian or guardians of such minor child or children; (3) if there be no widow, the allowance to the minor child or children shall be paid to the guardian or guardians of such minor child or children.⁸ The widow or the guardian of the minor children, as the case may be, shall have the right to take in payment of such allowance or any part thereof any of the personal property of the estate at its appraised value as shown by the appraisement returns.⁹ If there be no personal effects of the deceased that the widow or guardian is willing to take for such allowance, or not a sufficiency of them, and if there be no funds or not sufficient funds in the hands of such executor or administrator to pay such allowance or any part thereof, then it shall be the duty of the county judge, as soon as the inventory and appraisement and list of claims are returned and approved, to order a sale of so much of the estate for cash as will be sufficient to raise the amount of such allowance, or a part thereof as the case may require.¹⁰ The allowance made for the support of the widow and minor children of deceased shall be paid in preference to all other debts or charges against the estate, except the funeral expenses and expenses of last sickness of deceased, which claims shall be first paid, if presented within the time prescribed by law entitling them to such preference.¹¹ The allowance provided for in this chapter shall be paid as follows: (1) If there be both widow and minor child or children the widow shall be entitled to one half and the minor child or children to the other half; (2) if there be a widow and no child or children, the widow shall receive the whole; (3) if there be a minor child or children and no widow, such minor child or children shall receive the whole.¹²

§ 368. — the Order.

It was formerly held that it was the duty of the chief justice of the county, when we had that officer, to make the order¹³ granting the allowance, even in the absence of an application therefor. The requirements of the statute are now substantially the

⁸Ibid. art. 2041.

⁹Ibid. art. 2042.

¹⁰Ibid. art. 2043.

¹¹Ibid. art. 2044.

¹²Ibid. art. 2045.

¹³Connell v. Chandler, 11 Tex. 249.

me as then, and while the court may undoubtedly make the order without an application at the time designated by statute, still an application cannot be amiss if it can impart any information, in addition to the inventory and appraisement already made, to enable the court to act intelligently in making the allowance. The order, when made, has the force of a judgment, and cannot be collaterally impeached.¹⁴ The allowance is the widow's and minor children's as of course upon their application, and creditors should not be permitted to interfere so as to delay their obtaining the order. But until the order is actually made the widow cannot arbitrarily appropriate the estate for such purpose;¹⁵ yet creditors would probably have no room to complain if the widow without the order appropriated a part of the estate for her own and the minor children's support, if it appeared that the portion actually appropriated did not exceed the amount they were properly entitled to under the circumstances of the case.

§ 369. — Persons Entitled to, and When.

The allowance is for the benefit of all the minor children of the deceased, whether by his surviving wife or a former marriage.¹⁶ So the wife is entitled, although her marriage to the deceased is valid only as a common-law marriage, and her rights in this respect are governed by the laws applicable to descent and distribution in such cases generally. But if for any reason the wife cannot claim the exemption,—as where the marriage is neither good under the statute nor at common law, or where the deceased does not need the allowance,—yet if there be a minor child or children, the exemption is set apart nevertheless, and inures to the benefit of him or them.¹⁷ The court will not make the allowance where there is no necessity for it. It is only where the widow or the minor has not a sufficient estate in her own right, that it is allowed. If the widow owns sufficient separate property, or if she be amply provided for by her deceased husband's

¹⁴Pitner v. Flanagan, 17 Tex. 7;
¹⁵Lockhart v. White, 18 Tex. 102;
¹⁶May v. McFarland, 29 Tex. 163;
¹⁷Leaverton v. Leaverton, 40 Tex. 218.

¹⁴Chifflet v. Willis, 74 Tex. 245, 11 S. W. 1105.
¹⁶Harmon v. Bynum, 40 Tex. 324.
¹⁷Lockhart v. White, 18 Tex. 102.

will,¹⁸ no allowance can be made. Or if the minor children own in their own right sufficient property to adequately support them, none can be allowed as to them.¹⁹ The fact, it seems, that the minor is earning wages sufficient to support him, which he is allowed to appropriate to his own use, will not, if he otherwise owns no property in his own right, disentitle him to the allowance.²⁰ The parties entitled thereto do not lose their right to the allowance by their failure to ask for it, or the failure of the court to set it aside to them within the time prescribed by law, yet after that time if the estate be solvent and ready for distribution such order will not be made; it would be useless.²¹

The allowance may only cover the first twelve months succeeding the death of the husband,²² and can in no event exceed the amount mentioned in the statute.

§ 370. —Taking Property in Payment.

Prior to the act of 1848, which is essentially the same as the present statute, the widow and guardian of the minor children were not authorized to take property from the estate in satisfaction of their year's allowance; if the court made an order permitting such taking, not being authorized by law, it was void,²³ and the widow or minor, as the case might have been, acquired no title.²⁴ Only the personal property of the estate may be now taken.

§ 371. Setting Apart Homestead and Other Exempt Property; Allowance in Lieu; Statutes.

At the first term of the court after an inventory, appraisal, and list of claims have been returned, it shall be the duty of the court, by an order entered upon the minutes, to set apart for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased all such property of the estate as may be exempt from execu-

¹⁸Trousdale v. Trousdale, 35 Tex. 756.

¹⁹Sloan v. Webb, 20 Tex. 189.

²⁰Cooper v. Pierce, 74 Tex. 526, 12 S. W. 211.

²¹Little v. Birdwell, 27 Tex. 688.

²²Crocker v. Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870.

²³Marks v. Hill, 46 Tex. 345.

²⁴Newcomb v. Newcomb, 38 Tex. 561.

on or forced sale by the Constitution and laws of this state, with the exception of an exemption of one year's supply of provisions.²⁵ In case there should not be among the effects of the deceased all or any of the specific articles so exempted, it shall be the duty of the court to make a reasonable allowance in lieu thereof, to be paid to such widow and children, or such of them there may be, as hereinafter directed.²⁶ The allowance in lieu of a homestead shall in no case exceed \$5,000, and the allowance for other exempted property shall in no case exceed \$100, exclusive of the allowance provided in the preceding chapter (year's support).²⁷

The exempted property set apart to the widow and children shall be delivered by the executor or administrator without delay as follows: (1) If there be a widow and no children, or if the children be the children of the widow, the whole of such property shall be delivered to the widow; (2) if there be children and no widow, such property shall be delivered to such children if they be of lawful age, or to their guardian if they be minors, or the same may be equally divided among them, except the homestead; (3) if there be children of the deceased of whom the widow is not the mother, the share of such children in such exempted property, except the homestead, shall be delivered to such children if they be of lawful age, or to their guardian if they be minors, or may be equally divided between them; (4) in all cases the homestead shall be delivered to the widow, if there be one, and if there be no widow, to the guardian of the minor children and unmarried daughters, if any, living with the family.²⁸

The allowance made in lieu of any of the exempted property shall be paid either in money out of the funds of the estate, that may come to the hands of the executor or administrator, or in any property of the deceased that such widow or children if they be of lawful age, or their guardian if they be minors, may choose to take at the appraisement, or a part thereof, or both, as they may select.²⁹ Such allowance shall be paid by the executor or

²⁵Rev. Stat. art. 2046.

²⁶Ibid. art. 2047.

²⁷Ibid. art. 2048.

²⁸Ibid. art. 2049.

²⁹Ibid. art. 2050.

administrator in the following manner: (1) If there be a widow and no children, the whole to be paid to such widow; (2) if there be children and no widow, the whole to be paid to such children if they be of lawful age, or to their guardian if they be minors, or to be equally divided among them; (3) if there be both widow and children, the whole to be paid such widow if she be the mother of such children, but if she be not the mother of such children, one half to be paid to such widow and the other half to such children if they be of lawful age, or to their guardian if they be minors, or to be equally divided among them.³⁰

If there be no property of the deceased that such widow or children are willing to take for such allowance, or not a sufficiency, and there be no funds, or not sufficient funds of the estate in the hands of such executor or administrator to pay such allowance, or any part thereof, it shall be the duty of the county judge, on the application in writing of such widow and children, to order a sale of so much of the estate for cash as will be sufficient to raise the amount of such allowance, or a part thereof, as the case may require.³¹ No property upon which liens have been given by the husband and wife, acknowledged in a manner legally binding upon the wife to secure creditors, or upon which a vendor's lien exists, shall be set aside to the widow or children as exempted property, or appropriated to make up the allowance made in lieu of exempted property, until the debts secured by such liens are first discharged.³²

If upon a final settlement of such estate it shall appear that the same is solvent, the exempted property, except the homestead, which has been set apart to the widow or children, or both, together with any allowance that has been received by them in lieu thereof, shall be subject to partition and distribution among the heirs and distributees of such estate in like manner as the other property of the estate.³³ Should the estate upon final settlement prove to be insolvent, the title of the widow and children to all the property and allowances set apart or paid to them, under the provisions of this and of the preceding chap-

³⁰Ibid. art. 2051.

³¹Ibid. art. 2052.

³²Ibid. art. 2053.

³³Ibid. art. 2054.

ter (allowance for year's support) shall be absolute, and shall not be taken for any of the debts of the estate except as hereinafter provided.³⁴ In ascertaining whether an estate is solvent or insolvent, the exempt property set apart to the widow or children, or the allowance in lieu thereof, and the allowance provided for in the preceding chapter (year's support), shall not be estimated or considered as assets of the estate.³⁵

The homestead shall not be partitioned among the heirs of the deceased during the lifetime of the widow, or so long as she may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.³⁶ When the widow dies or sells her interest in the homestead, or elects to no longer use or occupy the same as a homestead, and when the proper court no longer permits the guardian of the minor children to use and occupy the same as a homestead, it may be partitioned among the respective owners thereof in like manner as other property held in common.³⁷ The homestead rights of the widow and children of deceased are the same whether the homestead be the separate property of the deceased or community property between the widow and the deceased, and the respective interests of such widow and children shall be the same in one case as in the other.³⁸ The homestead shall not be liable for the payment of any of the debts of the estate, except for the purchase money thereof, the taxes due thereon, or for work and material used in constructing improvements thereon; and in this last case only when the work and material are contracted for in writing, with the consent of the wife, given in the same manner as required in making a sale and conveyance of the homestead.³⁹

The exempted property other than the homestead, or any allowance made in lieu thereof, shall be liable for the payment of the funeral expenses and the expenses of last sickness of deceased, when presented within the time prescribed therefor;

³⁴Ibid. art. 2055.

³⁵Ibid. art. 2056.

³⁶Ibid. art. 2057.

³⁷Ibid. art. 2058.

³⁸Ibid. art. 2059.

³⁹Ibid. art. 2060.

but such property shall not be liable for any other debts of the estate.⁴⁰

On the death of the wife leaving a husband surviving, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of such surviving husband, or so long as he may elect to use or occupy the same as a homestead.⁴¹

§ 372. — Nature and Extent of These Rights.

One of the first things to be noticed, and one which, if always kept in mind, will often relieve many of the difficulties incident to this subject, is, that the setting apart of the exempted property of the estate or the allowance in lieu thereof is for the benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, and that such exemptions or allowance are not by the terms of the statute set apart for the benefit of the husband should he survive, nor yet for the benefit of the children except in the event of the death of the husband.⁴² They are statutory concessions, privileges, and immunities granted only in the event the husband dies leaving surviving him the persons named, or some of them, whose helpless condition, by common consent, demands the interposition of such statutes to protect them against the rapacity of creditors, and the claims of other heirs and devisees. So, then, whatever the rights of such surviving wife and children are, they are not theirs by inheritance⁴³ or devise,⁴⁴ but wholly by force of the statute conferring them. These rights are inviolable by any act of the deceased during his lifetime. He cannot defeat them by directing that the probate court have nothing to do with his estate,⁴⁵ nor by willing the property to another.⁴⁶ For the rights of devisees and legatees are only equal to those

⁴⁰Ibid. art. 2061.

⁴¹Ibid. art. 2062.

⁴²Watts v. Miller, 76 Tex. 13, 13 S. W. 16.

⁴³Shannon v. Gray, 59 Tex. 252, and authorities cited.

⁴⁴Roots v. Robertson, 93 Tex. 365, 55 S. W. 308.

⁴⁵Runnels v. Runnels, 27 Tex. 515.

⁴⁶Woolley v. Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

of heirs, and are subordinate to the rights of creditors, yet creditors cannot prevent the exemptions and allowances. The rule is the same whether the estate be administered by an executor or administrator. The statutes under discussion do not have the effect of changing the mode of descent of the property so set apart as exempted or as an allowance, but that is a question controlled wholly by the laws of descent and distribution generally. The only effect is to withdraw such property from the administration and from the claims of creditors, especially where the estate may prove to be insolvent.⁴⁷ Being thus withdrawn from the administration, the court has no power thereafter to order a sale of such property even for the support of the widow and children.⁴⁸ These statutes, and the action of the probate court, have not to do with title, but merely point out—set aside—the exempted property, if it exists in kind, and if not, then other funds or property in lieu thereof, as being no part of the estate for administration or payment of creditors, and secure these things to the widow and children. They do not confer rights of property where none existed before, but only impress upon a portion of the estate a quality—an exemption—which it would not otherwise possess. And here, unlike the allowance for the year's support, the right of the widow and children to the exemptions, or to an allowance in lieu thereof where the property does not exist in kind, is not dependent upon the inability of the widow and children to support themselves from their separate income or property. The act does not so provide, but follows our former acts in this respect.⁴⁹ Their right is superior to all ordinary claims,⁵⁰ judgment liens against the husband,⁵¹ and to any and all other liens not acknowledged in such manner as to be binding upon the wife, and not for the purchase money.⁵²

In *Woodall v. Rudd*, 41 Tex. 375, the rule is announced that where husband and wife voluntarily make a conveyance to their

⁴⁷*Nanny v. Allen*, 77 Tex. 240, 13 S. W. 989.

⁴⁸*Cummins v. Denton*, 1 Posey Unrep. Cas. (Tex.) 181.

⁴⁹*Mabry v. Ward*, 50 Tex. 404. See also *Terry v. Terry*, 39 Tex. 310;

Mayman v. Reviere, 47 Tex. 357; *Heathcock v. Goodrich*, 2 Posey Unrep. Cas. (Tex.) 584.

⁵⁰*Williams v. Hall*, 33 Tex. 212.

⁵¹*Giddings v. Crosby*, 24 Tex. 295.

⁵²*Griffie v. Maxey*, 58 Tex. 210.

minor children of their homestead, and the husband dies leaving an insolvent estate, the widow will not be permitted to have an allowance in lieu of the homestead, as against creditors whose demands existed at the date of the conveyance to such children. The holding is stated to be not in conflict with the well-recognized rule that a conveyance of exempt property is not fraudulent as to creditors.

While ordinarily the administrator or executor of the estate of the husband may dispose of the property of the deceased, or of the community,⁵³ he cannot do so in violation of the rights of the widow and children to their exemptions or allowances. But the widow may by accepting the proceeds of a sale of the estate made contrary to her rights, rather than insisting upon her exemptions and allowances, ratify and make valid his acts in this respect.⁵⁴

But she cannot, by an agreement made prior to her husband's death that the homestead should be sold and the proceeds divided in a particular manner, bind or estop herself.⁵⁵

These exemptions, or the allowance in lieu of them, must come from the estate of the deceased. If the property from which the exemptions or allowances are sought to be taken be owned by the husband and children of a former marriage, as cotenants, the rights of such children must be first satisfied before such property will be subject to the claims of the surviving widow and children for exemptions or allowances. To hold otherwise would be to make a different estate—the property of another person—contribute toward the exemptions or allowance for the widow, while the law and the probate court can only deal with such property as properly belongs to the estate of the deceased.⁵⁶

So, where by the terms of an insurance contract upon the husband's life, the company had agreed to pay the amount of the policy to a certain creditor as his interest might appear, such

⁵³*Soye v. McCallister*, 18 Tex. 80; *Corzine v. Williams*, 85 Tex. 499, 22 S. W. 399; *Moody v. Looscan* (Tex. Civ. App.) 44 S. W. 621.

⁵⁴*Williams v. Hall*, 33 Tex. 212.

⁵⁵*Winn v. Winn* (Tex. Civ. App.) 57 S. W. 80.

⁵⁶*Redding v. Boyd*, 64 Tex. 498; *Gilliam v. Null*, 58 Tex. 298; *Presley v. Robinson*, 57 Tex. 453; *Putnam v. Young*, 57 Tex. 461; *King v. Gilleland*, 60 Tex. 271; *Hoffman v. Hoffman*, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471; *Her. Prob. Guide*, 300.

amount so due the creditor would constitute no part of the deceased's estate, and the creditor's right thereto would not be affected by the order of the probate court setting the same apart in lieu of the exemptions not existing in kind.⁵⁷

Where the exempted property does not exist in kind, either in whole or in part, the court will make an allowance in lieu thereof, and within the prescribed limits much is left to its discretion as to the amount thereof. It would be useless to attempt to say what would be reasonable in every case; that being a question to be determined from the circumstances of each case.⁵⁸ The value of exempt property in kind turned over to the widow and children should not be considered in making an allowance for that not existing in kind; the allowance for a part may, if reasonable, reach the full statutory limit as to amount,⁵⁹ and, as in case of the allowance for the year's support, the widow or guardian of the minor children may take, in payment of the allowance, property of the estate at its appraisement value, with the additional privilege, in the instance of allowances in lieu of the exemptions, of taking the lands of the estate if desired, instead of personal property only.

The respective interests of the widow and children in the allowances are one half to the widow and one half to the children, and the title of each, in case the estate prove to be insolvent, is absolute.⁶⁰ This, where the allowances come from the estate of the deceased; but would their respective interests be the same where such allowances come from the community property? However that may be, the order can give the widow no power to sell the interest of her children in the exempted property or the allowance in lieu of it, in either event.⁶¹ With respect to the allowance for the year's support, the statute seems to contemplate a use of the same by the widow, where she is the mother of the minor children.⁶² If she be not their mother the exemptions, except the homestead, or the allowances in lieu, are to be

⁵⁷Andrews v. Union Cent. L. Ins. Co. (Tex. Civ. App.) 44 S. W. 610.

⁵⁸Mabry v. Ward, 50 Tex. 404; Terry v. Terry, 30 Tex. 310.

⁵⁹Cooper v. Pierce, 74 Tex. 526, 12 S. W. 211.

⁶⁰Rev. Stat. art. 2045; *ante*, § 367; Woolley v. Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

⁶¹Nanny v. Allen, 77 Tex. 240, 13 S. W. 989.

⁶²Rev. Stat. art. 2041; *ante*, § 367.

delivered to the children or their guardian as directed by statute,⁶³ and for a conversion of such children's portion the widow may be sued.⁶⁴

§ 373. — Further of the Homestead and Allowance in Lieu thereof.

This homestead of the widow and minor children, which may not inappropriately be denominated a probate homestead, while not expressly so stated, is coequal and coextensive with the constitutional homestead of the family. It is determined and defined in the same manner; may be either a rural or an urban, a residence or a business,⁶⁵ homestead; and where if the husband were alive he would be authorized to make selection thereof from among his lands, the same right rests in the surviving widow.⁶⁶ The court is not authorized to make the selection for her,⁶⁷ as its authority extends only to setting apart that which is exempted by law, where such property exists in kind, and if it does not exist in kind to make an allowance in lieu thereof; indeed, then, there can be little room for anyone to make a selection of the homestead, since the power of the court to set aside depends upon the exempt character of the property to the family at the time of the death of the husband, and whether or not it was homestead depends, of course, upon its use for such purpose at such time. So, whatever was the homestead at that time will be the subject of the order.⁶⁸ And its exempt character will then depend upon the existence of the facts authorizing its exemption to the survivors for its perpetuation. It is not sufficient that it was, prior to the husband's death, the homestead of the family, but there must still remain a constituent to claim it,—to be the beneficiary of the order pointing out the exemption; and by the act the recipients are limited to the widow, the minor children, and unmarried daughters remaining

⁶³Rev. Stat. art. 2051; *ante*, § 371.

⁶⁴*Burns v. Falls* (Tex. Civ. App.) 56 S. W. 576.

⁶⁵*King v. Harter*, 70 Tex. 579, 8 S. W. 308; *Evans v. Pace*, 21 Tex. Civ. App. 368, 51 S. W. 1094.

⁶⁶*Hough v. Shippey*, 16 Tex. Civ.

App. 88, 40 S. W. 332, S. C. 19 Tex. Civ. App. 596, 47 S. W. 672.

⁶⁷See *Harrison v. Oberthier*, 40 Tex. 385.

⁶⁸*Rogers v. Ragland*, 42 Tex. 422; *Hendrix v. Hendrix*, 46 Tex. 6; *Woodall v. Rudd*, 41 Tex. 375.

with the family.⁶⁹ And it will further depend upon its continued use by such widow, or the guardian of the minor children under the order of the proper court, for the purposes of a home. For when that ceases it is then subject to partition among the respective owners.⁷⁰ But this does not necessarily mean actual occupancy of the property, for the land may be used for homestead purposes and at the same time be temporarily in the possession of others.⁷¹ The act applies, and the power of the court extends, alike to whatever property actually constitutes the homestead of the family at the time of the husband's death, whether the same be the separate property of the husband or the community of the marriage.⁷² The respective interests of the heirs and owners will be different to be sure, but the practical operations of the statute and of the order of the court setting apart the exemption will be the same. Any attempt of the legislature to direct that the fee shall descend in a different manner than that provided by the organic law is, of course, futile.⁷³ The measure of value of the lots in a town or city used as homestead is determined, as in the case of the homestead of the family, by their value at the time of their designation without regard to any improvements thereon.⁷⁴ If there is no homestead, or it is incomplete, the widow is entitled to allowance in lieu of it;⁷⁵ for she cannot be compelled to accept a homestead which cannot be a homestead because of the necessity for a sale or partition, to satisfy the rights and interest of others.⁷⁶ But she cannot have both such homestead and allowance, nor can she have an appropriation by way of allowance to make up for what the homestead lacks in quantity or value of the constitutional limits.⁷⁷ But if she accepts such incomplete homestead her rights are not such as to prevent a partition of the land between herself and those rightfully owning the other interests; in other

⁶⁹*Givens v. Hudson*, 64 Tex. 471.
Compare *post*, § 374.

⁷⁰*White v. Small*, 22 Tex. Civ. App. 318, 54 S. W. 915.

⁷¹*Foreman v. Meroney*, 62 Tex. 723.

⁷²*Her. Prob. Guide*, 300.

⁷³*Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485.

⁷⁴See *Linch v. Broad*, 70 Tex. 92, 6 S. W. 751.

⁷⁵*Clift v. Kaufman*, 60 Tex. 64; *Hoffman v. Hoffman*, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471.

⁷⁶*Crocker v. Crocker*, 19 Tex. Civ. App. 296, 46 S. W. 870.

⁷⁷*Ibid.*; *Her. Prob. Guide*, 290.

words, this probate homestead must come out of the estate of the husband or the community, and not out of the estate or property of some other person.⁷⁸

This homestead forms no part of the estate of the deceased for administration, and the administrator has no concern with nor power over it.⁷⁹ If a constituent of the family survives, it is not assets for the payment of debts, but descends and vests absolutely in the heirs, subject only to the superior right of such constituent to its use and occupancy, and any attempted disposition by such administrator is absolutely ineffective.⁸⁰ Nor does this exemption from liability exist only during such time as the widow, or children through their guardian, may occupy the land for a homestead; but the exemption, if the estate prove insolvent, is absolute, and upon the death of the surviving constituent, or upon his ceasing to use the property for homestead purposes, it belongs to the heirs or other owners, and they are entitled to a partition thereof, free from the rights and claims of any and all creditors,⁸¹ except of those for purchase money, taxes, and certain improvements. But it is not every surviving constituent that has such an interest in the homestead as to avoid a partition, but only the surviving widow and minor children. While an adult unmarried daughter remaining with the family may have a homestead right, it is not such an one as under the law will defeat a partition amongst the heirs.⁸² This is the rule under the present law and was under former ones.⁸³

⁷⁸West v. West, 9 Tex. Civ. App. 475, 29 S. W. 242; *ante*. § 372; Andrews v. Union Cent. L. Ins. Co. (Tex. Civ. App.) 44 S. W. 610.

⁷⁹Mullins v. Yarborough, 44 Tex. 14; Scott v. Cunningham, 60 Tex. 566; Childers v. Henderson, 76 Tex. 667, 13 S. W. 481; Hall v. Fields, 81 Tex. 553, 17 S. W. 82; Zwernemann v. Von Rosenberg, 76 Tex. 522, 13 S. W. 485; Lacy v. Lockett, 82 Tex. 190, 17 S. W. 916; Cameron v. Morris, 83 Tex. 14, 18 S. W. 422; West v. West, 9 Tex. Civ. App. 475, 29 S. W. 242; McAllister v. Godbold (Tex. Civ. App.) 29 S. W. 417; Stephen-

son v. Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383.

⁸⁰Stephenson v. Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383.

⁸¹Lacy v. Lockett, 82 Tex. 190, 17 S. W. 916; Roots v. Robertson, 93 Tex. 365, 55 S. W. 308.

⁸²White v. Small, 22 Tex. Civ. App. 318, 54 S. W. 915, Writ of Error denied.

⁸³See Green v. Crow, 17 Tex. 180; Horn v. Arnold, 52 Tex. 161; Reeves v. Petty, 44 Tex. 249; Rainey v. Chambers, 56 Tex. 17; Scott v. Cunningham, 60 Tex. 566.

indeed, it would appear to be immaterial whether the state was solvent or insolvent so far as the ultimate rights of creditors in the homestead or the allowance in lieu of it are concerned; for it is specially directed that in determining whether or not an estate is solvent the exempted property, or the allowance in lieu, shall not be taken into consideration; and the provision permitting a partition and distribution of the estate when solvent especially excepts therefrom the homestead together with any allowance that has been received in lieu thereof. So that if the estate be solvent no resort need in any case be made by creditors to the homestead. The importance of the provision concerning insolvent estates is especially manifested in continuing the exempt character of other exempt property and allowances from partition and creditors. Under the former laws, prior to the adoption of the present Constitution, however, the order of the probate court setting aside the homestead or allowance in lieu had the effect, where the estate proved to be insolvent, of vesting the absolute fee in the beneficiaries named, to the exclusion of heirs not named, and it was not until the adoption of the present Constitution that the fee descended as other like property of its owner.⁸⁴ And it was formerly held, and such is still thought to be the effect of the statutes, that the homestead was protected to the surviving constituents whether the proper court made the order setting it apart or not.⁸⁵

The widow and others mentioned as the beneficiaries of the act are entitled to the free use and enjoyment of the homestead, or of the allowance in lieu of it, regardless of the interest they may own in the fee, and cannot be charged by other heirs and owners with rents.⁸⁶ She may waive her right to an allowance in lieu of the homestead, as by seeking a partition of the estate without reference to this right.⁸⁷ And to make up this allowance the court may permit her to take any property belonging to the estate at its appraisement value.⁸⁸ While article 2053 of

⁸⁴Paschal's Dig. art. 1305; Green v. Crow, 17 Tex. 180; McDougal v. Bradford, 80 Tex. 558, 16 S. W. 619.

⁸⁵Sossaman v. Powell, 21 Tex. 664.

⁸⁶Linch v. Broad, 70 Tex. 92, 6 S. W. 751.

M. W.—29.

⁸⁷Moore v. Moore (Tex. Civ. App.) 32 S. W. 161, S. C. 89 Tex. 29, 33 S. W. 217; Tiebout v. Millican, 61 Tex. 514.

⁸⁸Linares v. Linares, 93 Tex. 84, 53 S. W. 579.

the statutes⁸⁹ provides that no property upon which legally acknowledged or vendor's liens exist shall be set apart as exempted property, or appropriated to make an allowance therefor until such liens have been discharged, it has been held that such provision had no application where the estate was insolvent.⁹⁰ While that language is rather broadly stated, it indicates the rule to be that where the estate is insolvent the homestead rights and the allowance in lieu thereof are superior to all liens of whatsoever character and howsoever acknowledged, save those for the purchase money, for taxes due thereon,^{90'} and for improvements contracted for in the manner pointed out by law. It might follow, then, as in the *Krueger-Wolf Case*, that property upon which existed a lien acknowledged in a manner legally binding upon the wife, could be set apart in lieu of the homestead, or, of course, as the homestead itself, the estate being insolvent.

If the husband dies leaving a homestead upon the separate property of the wife, no allowance in lieu can be made to the widow and children, since the allowance is made only where there is no homestead at all. And no order setting apart such homestead is necessary. It is hers without such order.⁹¹

§ 374. Same Subject Continued.

Before dismissing the subject it is well to notice a little more particularly the persons who may be the beneficiaries of the exemption. In a general way the Constitution exempts the homestead of the family, and this has been held to imply an exemption so long as there remains a constituent of the family to claim the exemption.⁹² Another view has been expressed, which is not without excellent reasons to support it, that since the adoption of § 52 of article 16 of the Constitution, and articles 2048 *et seq.* of the Revised Statutes, no person other than the surviving husband or wife, the minor children or unmarried daughters remaining with the family, is entitled to take the

⁸⁹*Ante*, § 371.

⁹⁰*Krueger v. Wolf*, 12 Tex. Civ. App. 167, 33 S. W. 663.

^{90'}*State v. Jordan* (Tex. Civ. App.) 59 S. W. 826.

⁹¹*Ball v. Lowell*, 56 Tex. 579; *Her. Prob. Guide*, 476.

⁹²*Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Clark v. Goins* (Tex. Civ. App.) 23 S. W. 703.

freed from the claims of creditors.⁹³ But the trend isions, whether right or wrong, has been in the direction indicated in this section. So, a grandchild may,⁹⁴ or according to the circumstances of the case, be a conf the family of deceased so as to entitle him to have the exemption or allowance in lieu. But a child not either husband or wife, and which has never been by lly adopted, although a dependent of such family, is led.⁹⁵ Unmarried daughters include, not only those never been married, but those who are widowed and med to the parental home and again become members mily.⁹⁶ If upon the death of both husband and wife uent survive, then the exemption ceases, for there is any member of the family to be protected and the like other property of the estate, is subject to partition, old for the payment of debts.⁹⁸ And the like result, et to a partition, follows when the last surviving mem- family either sells or otherwise ceases to use the prop- omestead purposes.⁹⁹ But a deed by the surviving another of the property in consideration of a support mainder of her natural life, where she in pursuance of continues to reside upon such property, is not of it- andonment.¹ And as the occupancy of the property ardian of the minor children must be by virtue of an n the proper court, to protect it against partition,² so onment of such occupancy must be when the court di- The right of the widow to the use of the homestead

v. Price, 12 Tex. Civ. 4 S. W. 784; Roots v. 13 Tex. 365, 55 S. W. 308; Guide, 295.
Goins (Tex. Civ. App.) 3.
k v. Stringer (Tex. Civ. S. W. 677; Phillips v. ex. Civ. App. 408, 34 S.
n v. Hendricks (Tex. Civ. W. 859.
v. Henderson, 76 Tex. V. 481. But see Tram-
mell v. Neal, 1 Posey Unrep. Cas. (Tex.) 51.
"Givens v. Hudson, 64 Tex. 471; Craddock v. Burleson, 21 Tex. Civ. App. 250, 52 S. W. 644.
"Ante, § 371: Rev. Stat. art. 2058.
"Wilson v. Fields (Tex. Civ. App.) 50 S. W. 1024.
"Osborn v. Osborn, 76 Tex. 494, 13 S. W. 538; Gaines v. Gaines, 4 Tex. Civ. App. 408, 23 S. W. 465; Modisette v. National Bank (Tex. Civ. App.) 56 S. W. 1007.

nor of the allowance in lieu of the other exemptions.⁶ And if presumptions are indulged the same will be in favor of the existence of grounds for the separation and the allowance of her rights as widow.⁷

Article 4649 of the Revised Statutes, providing that every decree of partition and every judgment by which the title of land is recovered must be recorded before the same may be introduced in evidence, does not embrace the order of the probate court setting apart the homestead to those entitled to it. Such order may be introduced in a proper case notwithstanding the lack of such registration.⁸

While it is the duty of the county judge to make the allowances to which the widow and children are entitled, and to set aside the exemptions, should he fail or refuse, they are not without their remedy. The district court may revise the action of the county judge, or in a proper way even entertain original jurisdiction of a suit having for its object the securing of the exemptions or allowance in lieu; as where an independent executor refuses to recognize these rights, and attempts to dispose of the estate in opposition to them;⁹ or the district court may, in an action by a creditor against the widow, hear her prayer for the allowance, and its adjudication upon such question is binding upon her,¹⁰ but not upon the children if they are not parties to the suit.¹¹ But the regular and proper way is, of course, by application of the widow, or of the minors through their guardian, to the county judge to have the exemptions and allowances set apart.¹²

§ 375. Administration of Community Property; Statutes.

The community property of the husband and wife, except such as is exempt from forced sale, shall be liable for all the debts contracted during marriage. And in the settlement of such community estates it shall be the duty of the survivor, ex-

⁶Linares v. Linares, 93 Tex. 84, 53 S. W. 579.

⁷Ibid.

⁸Fossett v. McMahan, 74 Tex. 546, 12 S. W. 324.

⁹Runnels v. Runnels, 27 Tex. 515.

¹⁰Woolley v. Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

¹¹Ibid.

¹²See Hall v. Fields, 81 Tex. 553, 17 S. W. 82, S. C. (Tex. Civ. App.) 30 S. W. 386.

ecutor, or administrator, to keep a separate and distinct account of all the community debts allowed or paid in the settlement of such estates.¹³

Where the husband or wife dies intestate or becomes insane, having no child or children, and no separate property, the common property passes to the survivor, charged with the debts of the community, and no administration thereon or guardianship of the estate of the insane wife or husband shall be necessary.¹⁴

Where the wife dies or becomes insane, leaving a surviving husband and child or children, the husband shall have the exclusive management, control, and disposition of the community property in the same manner as during her lifetime or sanity, and it shall not be necessary that the insane wife shall join in conveyances of such property, or her privy examination and acknowledgment be taken to such conveyances, subject, however, to the provisions of this chapter.¹⁵

The husband shall within four years after the death of the wife, or her being declared insane, as provided by law, when there is a child or children, file a written application in the county court of the proper county, stating: (1) The death of his wife, or that she has been declared insane by a court of competent jurisdiction, and the time and place of her death or of such declaration; (2) that she left a child or children, giving the name, sex, residence, and age of each child; (3) that there is a community estate between the deceased or insane wife and himself; (4) such facts as show the jurisdiction of the court over the estate; (5) asking for the appointment of appraisers to appraise such estate.¹⁶

Upon the filing of such application the county judge shall without citation, and either in term time or in vacation, by an order entered upon the minutes of the court, appoint appraisers to appraise such estate as in other administrations.¹⁷

It shall be the duty of the surviving husband, with the assistance of any two of the appraisers, to make out a full, fair, and complete inventory and appraisal of such community estate, and the husband shall attach thereto a list of all community

¹³Rev. Stat. art. 2219.

¹⁴Ibid. art. 2220.

¹⁵Ibid. art. 2221.

¹⁶Ibid. art. 2222.

¹⁷Ibid. art. 2223.

debts due the estate, and such inventory, appraisement, and list shall be sworn to and subscribed and returned to the court within twenty days from the date of the order appointing appraisers, and in like manner as in other administrations.¹⁸

The surviving husband shall, at the same time he returns the inventory, appraisement, and list of claims, present to the court his bond with two or more good and sufficient sureties, payable and to be approved by the county judge, in a sum equal to the whole of the value of such community estate as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one half the surplus thereof after the payment of the debts with which the whole of such property is properly chargeable, to such person or persons as shall be entitled to receive the same.¹⁹

When any such inventory, appraisement, list of claims, and bond are returned to the county judge, he shall, either in term time or in vacation, examine the same and approve or disapprove them by an order to that effect entered upon the minutes of the court, and when approved the order approving the same shall also authorize such survivor to control, manage, and dispose of such community property in accordance with the provisions of this chapter.²⁰

When the order mentioned in the preceding article has been entered, such survivor, without any further action in the county court, shall have the right to control, manage, and dispose of such community property, real or personal, in such manner as may seem best for the interest of the estate, and of suing and being sued with regard to the same, in the same manner as during the lifetime of the deceased, and a certified copy of the order of the court mentioned in the preceding article shall be evidence of the qualification and right of such survivor.²¹

The survivor shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of such community property, and upon final partition of said estate shall account to the legal heirs of the deceased for their interest in such estate, and the increase and

¹⁸Ibid. art. 2224.

¹⁹Ibid. art. 2225.

²⁰Ibid. art. 2226.

²¹Ibid. art. 2227.

profits of the same, after deducting therefrom all community debts, unavoidable losses, necessary and reasonable expenses, and a reasonable commission for the management of the same.²²

Any person interested in such community estate may cause a new appraisement to be made of the same, or a new bond may be required of the survivor for the causes and in like manner as provided in other administrations.²³

It shall be the duty of the survivor to pay all just and legal community debts as soon as practicable, and according to the classification and in the order prescribed for the payment of debts in other administrations.²⁴

Any creditor of the estate whose claim has not been paid in full may, after the lapse of one year from the filing of the inventory, appraisement, list of claims, and bond by the survivor, cause such survivor to be cited to appear at a regular term of the court in which such bond has been filed, and make an exhibit to the court in writing and under oath, showing fully and specifically:—(1) The debts that have been presented him against such community estates and their class; (2) the debts that have been paid by him, and those that remain unpaid, and the class of each; (3) the property that has been disposed of by him and the amount that has been received therefor; (4) the property remaining on hand; (5) an account of losses, expenses, and commissions.²⁵

When such exhibit has been returned to the court and filed, the court shall, at a regular term, examine the same and hear exceptions and objections thereto, and evidence in support of or against the same, and if satisfied that the estate has been fairly administered and in conformity to law, and that there remains no further property of such estate for the payment of debts, the court shall enter an order upon the minutes approving such exhibit and directing the same to be recorded in the minutes, and shall also in such order declare such administration closed.²⁶

But should it appear to the court from such exhibit or from other evidence that such estate has been improperly adminis-

²²Ibid. art. 2228.

²³Ibid. art. 2229.

²⁴Ibid. art. 2230.

²⁵Ibid. art. 2231.

²⁶Ibid. art. 2232.

tered, or that there are still assets of said estate that are liable for the payment of the applicant's debt or any part thereof, and if said debt be for the amount of \$1,000 or less, exclusive of interest, the court shall order citation to issue for the sureties upon the bond of such survivor, citing them to appear before such court at a regular term thereof, and show cause why judgment should not be rendered against them for such debt and costs, which citation shall be returnable as in other civil suits, and the proceedings in such case shall be the same as in other civil suits in said court.²⁷

Should the amount due and payable to such creditor exceed \$1,000, exclusive of interest, the court shall enter an order upon the minutes requiring the survivor to pay such debt or a part thereof, as the evidence may show to be proper, and should he neglect to pay the same for thirty days after the date of such order the creditor may have his action in the district court of the county where the survivor's bond is filed against such survivor and the sureties upon his bond; and in such case a certified copy of such bond, or the record thereof, and of the proceedings and orders of the county court in the estate, shall be evidence in any other court.²⁸

Should the survivor, after being duly cited, fail to file an exhibit as required, the court shall proceed, in accordance with the provisions of the two preceding articles, as if the creditor's right to the payment of his claim had been fully established.²⁹

The wife may retain the exclusive management, control, and disposition of the community property of herself and deceased or insane husband in the same manner, and subject to the same rights, rules, and regulations as provided in the case of the husband, and until she shall, in the event of the death of the husband, marry again.³⁰

The use of the words "survivor" or "surviving" in the above and foregoing articles of this chapter, where no other designation is given, shall be held to apply as well to a sane person representing an insane person.³¹

²⁷Ibid. art. 2233.

²⁸Ibid. art. 2234.

²⁹Ibid. art. 2235.

³⁰Ibid. art. 2236.

³¹Ibid. art. 2236a.

Upon the marriage of the surviving wife she shall cease to have such control and management of said estate or the right to dispose of the same, and said estate shall be subject to administration as in other cases of deceased persons' estates.³²

After the lapse of twelve months from the filing of the bond by the survivor, the persons entitled to the deceased's share of such community estate, or any portion thereof, shall be entitled to demand and have a partition and distribution thereof in the same manner as in other administrations.³³

Whenever such insane husband or wife shall have recovered sanity, then all action hereunder shall cease, and a report shall be made under oath of all transactions had and done under said proceedings, and said report shall be filed and recorded in the court where such proceedings were had, and with the other papers of the case.³⁴

Persons now acting as guardians of the estates of persons of unsound mind shall turn over the estates of their wards, where the wards shall be married persons, upon the qualification of the sane spouse, as provided in this chapter.³⁵

§ 376. — Nature of Survivor's Holding.

The administration of community property by the survivor is one of very great latitude under the statute. His holding is a peculiar one. He is the owner in his own right of one half of the property, and, upon qualifying under the statute and giving the bond required, acquires over the whole the same right of management, control, and disposition exercised by the husband during the existence of the marriage. The manner of his administering his trust is not defined by law. A bond is required of him, of ample proportions to fully protect the possible interests of creditors and distributees, and then in the details of the control of the estate much latitude is allowed him. His holding is in a sense a trust,³⁶ yet he may sell every article of the estate and pay the debts with the proceeds, or sell a part and distribute the remainder either in money or property according as

³²Ibid. art. 2237.

³³Ibid. art. 2238.

³⁴Ibid. art. 2238a.

³⁵Ibid. art. 2238b.

³⁶Taylor v. Taylor (Tex. Civ. App.) 26 S. W. 889.

may have it on hand. If the trust be abused the statute gives remedy to the injured person by an action upon the bond, thus operating the property of the estate so far as the survivor's control is concerned. His right of management and disposition is practically unlimited, he being required to account in the end for its disposition in a general way, charging himself with the property, and crediting himself with debts discharged. The survivor's powers, too, are much broader than those of an ordinary administrator. He may make any contract necessary in connection with the estate he represents, as for the employment of an attorney,³⁷ or for the services of a person in locating land certificates,³⁸ and the like. He is not compelled to go to the probate court for authority to act in any case, but administers the estate much as an independent executor,³⁹ which person, he resembles more than an administrator.⁴⁰ Claims against the estate are not to be presented to him for allowance, nor are they to be approved by the county judge.⁴¹ The giving the bond as a security, and the filing of the inventory and lists as a means of properly charging him with the aggregate of the estate, authorize him upon proper order of the court to manage and dispose of the estate at will. The act authorizing a community administration did not have the effect of permitting the survivor to qualify and dispose of the entire estate, where under the prior laws in force at the date of the death of the deceased parent the children had already inherited their portion of the property.⁴²

§77. — Paying Community Debts.

The first provision of the statutes authorizing a community administration is a recognition of the liability of the community property for debts contracted during marriage. The existence of the debt against the estate is a question to be determined by the survivor, subject, of course, to his being held to account

³⁷James v. Turner, 78 Tex. 241, 14 W. 574.

³⁸Halbert v. Carroll (Tex. Civ. App.) 25 S. W. 1102.

³⁹Evans v. Taylor, 60 Tex. 422; ⁴⁰Aborn v. Robinson (Tex. Civ. App.) 15 S. W. 327.

⁴¹Huppman v. Schmidt, 65 Tex. 583.

⁴²Oppenheimer v. DeLopez (Tex. Civ. App.) 31 S. W. 826.

⁴³Magee v. Rice, 37 Tex. 483.

may in a sense be said to be absolute, while that of the minor children depends upon the determination of the probate court in the exercise of a proper discretion.³ Upon application for a partition, if it appears that some of the children are minors, and that their right to the use of the same has never been determined by the probate court, it is the duty of the court to arrest the proceedings until such right can be passed upon by appropriate proceedings.⁴

There is an instance where the surviving widow will not be entitled to the exemptions spoken of in these sections, nor to any allowance in lieu. We have seen that if no constituent of the family remained to claim the exemption, the homestead, like other real estate of the deceased, was subject to partition or sale for payment of debts. And if, as said by Mr. J. Lipscomb, in an early case, "the wife has wantonly destroyed the harmony of the matrimonial relation, and voluntarily withdrawn from the narrow but sacred precincts of that home in which she was protected by the law, and is no longer found a priestess ministering at the household altars," she should not be permitted to claim the immunities conferred upon one recognizing and fulfilling those sacred duties.⁵ But before the separation of husband and wife will have the effect of depriving the wife of her rights as a surviving widow, the separation must have been without just cause upon her part. For it would be contrary to the most obvious principles of justice to hold that a justifiable abandonment would work a forfeiture of her rights as a surviving widow. It may be, however, in a proper case that an abandonment by the wife upon good excuse will defeat her interests in the husband's homestead, but this because the probate court can only set apart the homestead of the family to the surviving constituents, and if the same be not in fact or law the homestead of the wife as well as the husband it cannot be so set apart; but this will not have the further effect of depriving her of an allowance in lieu of the homestead which does not in fact exist in such case,

³Garrison v. Ferguson (Tex. Civ. App.) 54 S. W. 247.

⁴Osborn v. Osborn, 76 Tex. 494, 13 S. W. 538; Bell v. Read (Tex. Civ. App.) 56 S. W. 584.

⁵Trawick v. Harris, 8 Tex. 312; Earle v. Earle, 9 Tex. 630; Sears v. Sears, 45 Tex. 557; Newland v. Holland, 45 Tex. 589; Cockrell v. Curtis, 83 Tex. 105, 18 S. W. 436.

nor of the allowance in lieu of the other exemptions.⁶ And if presumptions are indulged the same will be in favor of the existence of grounds for the separation and the allowance of her rights as widow.⁷

Article 4649 of the Revised Statutes, providing that every decree of partition and every judgment by which the title of land is recovered must be recorded before the same may be introduced in evidence, does not embrace the order of the probate court setting apart the homestead to those entitled to it. Such order may be introduced in a proper case notwithstanding the lack of such registration.⁸

While it is the duty of the county judge to make the allowances to which the widow and children are entitled, and to set aside the exemptions, should he fail or refuse, they are not without their remedy. The district court may revise the action of the county judge, or in a proper way even entertain original jurisdiction of a suit having for its object the securing of the exemptions or allowance in lieu; as where an independent executor refuses to recognize these rights, and attempts to dispose of the estate in opposition to them;⁹ or the district court may, in an action by a creditor against the widow, hear her prayer for the allowance, and its adjudication upon such question is binding upon her,¹⁰ but not upon the children if they are not parties to the suit.¹¹ But the regular and proper way is, of course, by application of the widow, or of the minors through their guardian, to the county judge to have the exemptions and allowances set apart.¹²

§ 375. Administration of Community Property; Statutes.

The community property of the husband and wife, except such as is exempt from forced sale, shall be liable for all the debts contracted during marriage. And in the settlement of such community estates it shall be the duty of the survivor, ex-

⁶Linares v. Linares, 93 Tex. 84, 53 S. W. 579.

⁷Ibid.

⁸Fossett v. McMahan, 74 Tex. 546, 12 S. W. 324.

⁹Runnels v. Runnels, 27 Tex. 515.

¹⁰Woolley v. Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

¹¹Ibid.

¹²See Hall v. Fields, 81 Tex. 553, 17 S. W. 82, S. C. (Tex. Civ. App.) 30 S. W. 386.

ecutor, or administrator, to keep a separate and distinct account of all the community debts allowed or paid in the settlement of such estates.¹³

Where the husband or wife dies intestate or becomes insane, having no child or children, and no separate property, the common property passes to the survivor, charged with the debts of the community, and no administration thereon or guardianship of the estate of the insane wife or husband shall be necessary.¹⁴

Where the wife dies or becomes insane, leaving a surviving husband and child or children, the husband shall have the exclusive management, control, and disposition of the community property in the same manner as during her lifetime or sanity, and it shall not be necessary that the insane wife shall join in conveyances of such property, or her privy examination and acknowledgment be taken to such conveyances, subject, however, to the provisions of this chapter.¹⁵

The husband shall within four years after the death of the wife, or her being declared insane, as provided by law, when there is a child or children, file a written application in the county court of the proper county, stating: (1) The death of his wife, or that she has been declared insane by a court of competent jurisdiction, and the time and place of her death or of such declaration; (2) that she left a child or children, giving the name, sex, residence, and age of each child; (3) that there is a community estate between the deceased or insane wife and himself; (4) such facts as show the jurisdiction of the court over the estate; (5) asking for the appointment of appraisers to appraise such estate.¹⁶

Upon the filing of such application the county judge shall without citation, and either in term time or in vacation, by an order entered upon the minutes of the court, appoint appraisers to appraise such estate as in other administrations.¹⁷

It shall be the duty of the surviving husband, with the assistance of any two of the appraisers, to make out a full, fair, and complete inventory and appraisal of such community estate, and the husband shall attach thereto a list of all community

¹³Rev. Stat. art. 2219.

¹⁴Ibid. art. 2220.

¹⁵Ibid. art. 2221.

¹⁶Ibid. art. 2222.

¹⁷Ibid. art. 2223.

debts due the estate, and such inventory, appraisement, and list shall be sworn to and subscribed and returned to the court within twenty days from the date of the order appointing appraisers, and in like manner as in other administrations.¹⁸

The surviving husband shall, at the same time he returns the inventory, appraisement, and list of claims, present to the court his bond with two or more good and sufficient sureties, payable and to be approved by the county judge, in a sum equal to the whole of the value of such community estate as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one half the surplus thereof after the payment of the debts with which the whole of such property is properly chargeable, to such person or persons as shall be entitled to receive the same.¹⁹

When any such inventory, appraisement, list of claims, and bond are returned to the county judge, he shall, either in term time or in vacation, examine the same and approve or disapprove them by an order to that effect entered upon the minutes of the court, and when approved the order approving the same shall also authorize such survivor to control, manage, and dispose of such community property in accordance with the provisions of this chapter.²⁰

When the order mentioned in the preceding article has been entered, such survivor, without any further action in the county court, shall have the right to control, manage, and dispose of such community property, real or personal, in such manner as may seem best for the interest of the estate, and of suing and being sued with regard to the same, in the same manner as during the lifetime of the deceased, and a certified copy of the order of the court mentioned in the preceding article shall be evidence of the qualification and right of such survivor.²¹

The survivor shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of such community property, and upon final partition of said estate shall account to the legal heirs of the deceased for their interest in such estate, and the increase and

¹⁸Ibid. art. 2224.

¹⁹Ibid. art. 2225.

²⁰Ibid. art. 2226.

²¹Ibid. art. 2227.

profits of the same, after deducting therefrom all community debts, unavoidable losses, necessary and reasonable expenses, and a reasonable commission for the management of the same.²²

Any person interested in such community estate may cause a new appraisement to be made of the same, or a new bond may be required of the survivor for the causes and in like manner as provided in other administrations.²³

It shall be the duty of the survivor to pay all just and legal community debts as soon as practicable, and according to the classification and in the order prescribed for the payment of debts in other administrations.²⁴

Any creditor of the estate whose claim has not been paid in full may, after the lapse of one year from the filing of the inventory, appraisement, list of claims, and bond by the survivor, cause such survivor to be cited to appear at a regular term of the court in which such bond has been filed, and make an exhibit to the court in writing and under oath, showing fully and specifically:—(1) The debts that have been presented him against such community estates and their class; (2) the debts that have been paid by him, and those that remain unpaid, and the class of each; (3) the property that has been disposed of by him and the amount that has been received therefor; (4) the property remaining on hand; (5) an account of losses, expenses, and commissions.²⁵

When such exhibit has been returned to the court and filed, the court shall, at a regular term, examine the same and hear exceptions and objections thereto, and evidence in support of or against the same, and if satisfied that the estate has been fairly administered and in conformity to law, and that there remains no further property of such estate for the payment of debts, the court shall enter an order upon the minutes approving such exhibit and directing the same to be recorded in the minutes, and shall also in such order declare such administration closed.²⁶

But should it appear to the court from such exhibit or from other evidence that such estate has been improperly adminis-

²²Ibid. art. 2228.

²³Ibid. art. 2229.

²⁴Ibid. art. 2230.

²⁵Ibid. art. 2231.

²⁶Ibid. art. 2232.

tered, or that there are still assets of said estate that are liable for the payment of the applicant's debt or any part thereof, and if said debt be for the amount of \$1,000 or less, exclusive of interest, the court shall order citation to issue for the sureties upon the bond of such survivor, citing them to appear before such court at a regular term thereof, and show cause why judgment should not be rendered against them for such debt and costs, which citation shall be returnable as in other civil suits, and the proceedings in such case shall be the same as in other civil suits in said court.²⁷

Should the amount due and payable to such creditor exceed \$1,000, exclusive of interest, the court shall enter an order upon the minutes requiring the survivor to pay such debt or a part thereof, as the evidence may show to be proper, and should he neglect to pay the same for thirty days after the date of such order the creditor may have his action in the district court of the county where the survivor's bond is filed against such survivor and the sureties upon his bond; and in such case a certified copy of such bond, or the record thereof, and of the proceedings and orders of the county court in the estate, shall be evidence in any other court.²⁸

Should the survivor, after being duly cited, fail to file an exhibit as required, the court shall proceed, in accordance with the provisions of the two preceding articles, as if the creditor's right to the payment of his claim had been fully established.²⁹

The wife may retain the exclusive management, control, and disposition of the community property of herself and deceased or insane husband in the same manner, and subject to the same rights, rules, and regulations as provided in the case of the husband, and until she shall, in the event of the death of the husband, marry again.³⁰

The use of the words "survivor" or "surviving" in the above and foregoing articles of this chapter, where no other designation is given, shall be held to apply as well to a sane person representing an insane person.³¹

²⁷Ibid. art. 2233.

²⁸Ibid. art. 2234.

²⁹Ibid. art. 2235.

³⁰Ibid. art. 2236.

³¹Ibid. art. 2236a.

Upon the marriage of the surviving wife she shall cease to have such control and management of said estate or the right to dispose of the same, and said estate shall be subject to administration as in other cases of deceased persons' estates.³²

After the lapse of twelve months from the filing of the bond by the survivor, the persons entitled to the deceased's share of such community estate, or any portion thereof, shall be entitled to demand and have a partition and distribution thereof in the same manner as in other administrations.³³

Whenever such insane husband or wife shall have recovered sanity, then all action hereunder shall cease, and a report shall be made under oath of all transactions had and done under said proceedings, and said report shall be filed and recorded in the court where such proceedings were had, and with the other papers of the case.³⁴

Persons now acting as guardians of the estates of persons of unsound mind shall turn over the estates of their wards, where the wards shall be married persons, upon the qualification of the sane spouse, as provided in this chapter.³⁵

§ 376. — Nature of Survivor's Holding.

The administration of community property by the survivor is one of very great latitude under the statute. His holding is a peculiar one. He is the owner in his own right of one half of the property, and, upon qualifying under the statute and giving the bond required, acquires over the whole the same right of management, control, and disposition exercised by the husband during the existence of the marriage. The manner of his administering his trust is not defined by law. A bond is required of him, of ample proportions to fully protect the possible interests of creditors and distributees, and then in the details of the control of the estate much latitude is allowed him. His holding is in a sense a trust,³⁶ yet he may sell every article of the estate and pay the debts with the proceeds, or sell a part and distribute the remainder either in money or property according as

³²Ibid. art. 2237.

³³Ibid. art. 2238.

³⁴Ibid. art. 2238a.

³⁵Ibid. art. 2238b.

³⁶Taylor v. Taylor (Tex. Civ. App.) 26 S. W. 889.

he may have it on hand. If the trust be abused the statute gives remedy to the injured person by an action upon the bond, thus liberating the property of the estate so far as the survivor's control is concerned. His right of management and disposition is practically unlimited, he being required to account in the end for its disposition in a general way, charging himself with the property, and crediting himself with debts discharged. The survivor's powers, too, are much broader than those of an ordinary administrator. He may make any contract necessary in connection with the estate he represents, as for the employment of an attorney,³⁷ or for the services of a person in locating land certificates,³⁸ and the like. He is not compelled to go to the probate court for authority to act in any case, but administers the estate much as an independent executor,³⁹ which person he resembles more than an administrator.⁴⁰ Claims against the estate are not to be presented to him for allowance, nor are they to be approved by the county judge.⁴¹ The giving the bond as a security, and the filing of the inventory and lists as a means of properly charging him with the aggregate of the estate, authorize him upon proper order of the court to manage and dispose of the estate at will. The act authorizing a community administration did not have the effect of permitting the survivor to qualify and dispose of the entire estate, where under the prior laws in force at the date of the death of the deceased parent the children had already inherited their portion of the property.⁴²

§ 377. — Paying Community Debts.

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³⁸Halbert v. Carroll (Tex. Civ. App.) 25 S. W. 1102.

³⁹Evans v. Taylor, 60 Tex. 422; Osborn v. Robinson (Tex. Civ. App.) 35 S. W. 327.

⁴⁰Huppmann v. Schmidt, 65 Tex. 583.

⁴¹Oppenheimer v. DeLopez (Tex. Civ. App.) 31 S. W. 826.

⁴²Magee v. Rice, 37 Tex. 483.

Upon the marriage of the surviving wife she shall cease to have such control and management of said estate or the right to dispose of the same, and said estate shall be subject to administration as in other cases of deceased persons' estates.³²

After the lapse of twelve months from the filing of the bond by the survivor, the persons entitled to the deceased's share of such community estate, or any portion thereof, shall be entitled to demand and have a partition and distribution thereof in the same manner as in other administrations.³³

Whenever such insane husband or wife shall have recovered sanity, then all action hereunder shall cease, and a report shall be made under oath of all transactions had and done under said proceedings, and said report shall be filed and recorded in the court where such proceedings were had, and with the other papers of the case.³⁴

Persons now acting as guardians of the estates of persons of unsound mind shall turn over the estates of their wards, where the wards shall be married persons, upon the qualification of the sane spouse, as provided in this chapter.³⁵

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³²Ibid. art. 2237.

³³Ibid. art. 2238.

³⁴Ibid. art. 2238a.

³⁵Ibid. art. 2238b.

³⁶Taylor v. Taylor (Tex. Civ. App.) 26 S. W. 889.

he may have it on hand. If the trust be abused the statute gives remedy to the injured person by an action upon the bond, thus liberating the property of the estate so far as the survivor's control is concerned. His right of management and disposition is practically unlimited, he being required to account in the end for its disposition in a general way, charging himself with the property, and crediting himself with debts discharged. The survivor's powers, too, are much broader than those of an ordinary administrator. He may make any contract necessary in connection with the estate he represents, as for the employment of an attorney,³⁷ or for the services of a person in locating land certificates,³⁸ and the like. He is not compelled to go to the probate court for authority to act in any case, but administers the estate much as an independent executor,³⁹ which person he resembles more than an administrator.⁴⁰ Claims against the estate are not to be presented to him for allowance, nor are they to be approved by the county judge.⁴¹ The giving the bond as a security, and the filing of the inventory and lists as a means of properly charging him with the aggregate of the estate, authorize him upon proper order of the court to manage and dispose of the estate at will. The act authorizing a community administration did not have the effect of permitting the survivor to qualify and dispose of the entire estate, where under the prior laws in force at the date of the death of the deceased parent the children had already inherited their portion of the property.⁴²

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³⁸Halbert v. Carroll (Tex. Civ. App.) 25 S. W. 1102.

³⁹Evans v. Taylor, 60 Tex. 422; Osborn v. Robinson (Tex. Civ. App.) 35 S. W. 327.

⁴⁰Huppman v. Schmidt, 65 Tex. 583.

⁴¹Oppenheimer v. DeLopez (Tex. Civ. App.) 31 S. W. 826.

⁴²Magee v. Rice, 37 Tex. 483.

should he in bad faith pay where he was not liable, and no presentation and allowance by the court is required or necessary.⁴³ The payment should be as soon as practicable, and according to the classification and in the order prescribed for the payment of debts in other administrations.⁴⁴ It has been said that the payment should be *pro rata* among the creditors where the estate is insolvent;⁴⁵ but the contrary is the better rule.⁴⁶ The act not being intended to curtail any of the rights that might be exercised by the survivor without administration,⁴⁷ and in the absence of an administration the survivor having the right to pay one community debt to the exclusion of another, it would seem to follow that the survivor qualified under the statute would have no less power. While a survivorship proceeding is unquestionably a species of administration, yet the obvious purpose of the act was to invest a more liberal power in the representative, and for this departure there exist the most abundant reasons. It was not the purpose to curtail the rights of the survivor. But more will be said of this in subsequent sections.

§ 378. — Sales by Survivor.

The principal purpose of a community administration is to empower the survivor to dispose of the community property. Nor is it wholly for the purpose of paying debts, for that power exists independently of any species of administration. But to permit an indiscriminate and unrestricted disposition of the estate by the survivor would be to ignore the rights of children and others in the estate; hence the requirement of inventory, lists, and bond. The chief feature of the order granting the administration is the authority given the survivor to control, manage, and dispose of the property in such manner as may seem best for the interest of the estate. He is not limited then to sales for the purpose of paying debts, but the bond takes the place of the property so far as creditors and distributees are concerned,⁴⁸ and he

⁴³*Ante*, § 376.

⁴⁴*Ante*, § 375; Rev. Stat. art. 2230.

⁴⁵*Evans v. Taylor*, 60 Tex. 422.

⁴⁶*Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. 173; *Citizens' Nat.*

Bank v. Jones, 22 Tex. Civ. App. 45, 54 S. W. 405.

⁴⁷*Dawson v. Holt*, 44 Tex. 174.

⁴⁸*Black v. Rockmore*, 50 Tex. 88.

may freely sell for any purpose,⁴⁹ for he is not bound to account for the property received in kind, but only for its value if disposed of above the debts and charges he may have settled. If the bond or inventory be insufficient, heirs or creditors may have them remedied; but their rights are protected by the bond, and the property is released to the almost unlimited control of the survivor. But the filing of a bond will not have the effect of validating a sale already made without authority,⁵⁰ but if the sale be only negotiated and the conveyance not actually delivered until after bond, it is good,⁵¹ and conveys the entire estate, not the survivor's interest alone.⁵² And again, the survivor, where authorized to sell himself, either by the existence of debts or the giving of the bond, may do so through a regularly appointed agent.⁵³ But if the bond or other proceedings be insufficient to authorize the survivor to sell, and he be not otherwise authorized by the existence of community debts, his attempt to convey will only affect his interest in the estate.⁵⁴ This, of course, may be all or only a part, according as there are other heirs or not. The right to dispose includes the right to mortgage the community.⁵⁵

§ 379. — Exemptions.

It is only the community property not exempted from forced sale that is liable for the debts of the marriage. In other words the question of exemptions and allowances is controlled by the statutes already noticed; the rights of the surviving constituents of the family are the same whether the estate left be the separate estate of the deceased or a community estate of himself and the survivor. The widow and minor children do not lose the rights guaranteed to them in the estate of the deceased husband, simply because that estate may be a community estate, and

⁴⁹Green v. White, 18 Tex. Civ. App. 509, 45 S. W. 389.

⁵⁰Griffin v. Ford, 60 Tex. 501.

⁵¹Culp v. Jones (Tex. Civ. App.) 24 S. W. 1123; Ford v. Cowan, 64 Tex. 129.

⁵²Green v. Grissom, 53 Tex. 432; Withrow v. Adams, 4 Tex. Civ. App.

438, 23 S. W. 437; Leatherwood v. Arnold, 66 Tex. 414, 1 S. W. 173.

⁵³Withrow v. Adams, 4 Tex. Civ. App. 438, 23 S. W. 437.

⁵⁴Wilson v. Fields (Tex. Civ. App.) 50 S. W. 1024.

⁵⁵Jordan v. Imthurn, 51 Tex. 276.

therefore owned in part by such widow. No different rules in this respect apply to the administration of the community estate from those applicable to others.⁵⁶ If by applying for a survivorship administration the widow and children lost their homestead and other exemptions and all allowances, there would be little to commend the statute authorizing community administrations, which is ordinarily understood to be liberalizing toward the surviving partner. True, the statutes do not expressly, in the chapter authorizing such administration, provide for the setting apart of the allowances and exemptions, but it is not thought that such was necessary. No other intention can be attributed to the legislative mind. It may be that the general practice is not to make such orders where the administration is by the survivor, but even if that be true we have seen that the failure of the court to set aside the exemptions will not have the effect of subjecting them to liability, and certain it is that if the administration were under the general administration statutes, whether set apart or not, they would be exempt, and it is thought that undeniably the same results will follow where the administration is by a surviving husband or wife.⁵⁷ In this connection the following observations will not be amiss. The widow is entitled to a year's allowance only where she has not a sufficient income of her own. In any case one half, and in others all, the community property is hers after the community debts are paid. So the court will duly consider her interest in the community in awarding her the allowance for the year's support. Creditors have no greater rights in the community property than in the separate estate of the husband, and it cannot be conceived how their rights would be prejudicially affected by taking the exemptions or allowances allowed by law from the community rather than the deceased husband's separate estate. The results to them are the same in both cases. If for any reason property which would ordinarily be exempted cannot in the particular instance be so held, the order cannot be made to the prejudice of one whose rights are jeopardized. Thus, the landlord's lien upon certain property

⁵⁶Her. Prob. Guide, 453; Green v. 654; Leatherwood v. Arnold, 66 Tex. Raymond, 58 Tex. 80. 414, 1 S. W. 174.

⁵⁷See Nichols v. Oliver, 64 Tex.

of his tenant is superior to the exemptions of the statute, and consequently to the right of the widow and minor children to have such property set apart to them.⁵⁸

§ 380. — What, then, are Assets of the Estate?

If we are correct in our reasoning in the foregoing section it, of course, follows that property which would not be considered assets in the hands of an ordinary administrator for the payment of debts would also not be considered assets in the hands of the survivor. That the homestead and other exempted property belonging to the community estate of a deceased husband and surviving widow or other constituent passes to such widow or other constituent, free from administration and the rights of creditors where the estate proves to be insolvent, has been repeatedly decided.⁵⁹ And equally as often has it been held that the homestead formed no part of the estate for administration,⁶⁰ nor the other exempted property where the estate proved insolvent. Then it follows that the survivor, as representative of the deceased's estate, has no greater rights in, or power over, the exempted articles of the estate than has an ordinary executor or administrator. And that the widow's beneficial interest in, and immunities concerning them, are the same in each case, whether she administers the estate or not. This brings us to a consideration of an extremely difficult question.

§ 381. — Power of Survivor to Sell the Homestead.†

If the homestead be the property of the surviving husband or

⁵⁸Champion v. Shumate, 90 Tex. 597, 39 S. W. 128, 362, 40 S. W. 394.

⁵⁹See Lacy v. Lockett, 82 Tex. 190, 17 S. W. 916; Cameron v. Morris, 83 Tex. 14, 18 S. W. 422; Watson v. Rainey, 69 Tex. 319, 6 S. W. 840.

⁶⁰Lacy v. Lockett, 82 Tex. 190, 17 S. W. 916; Cameron v. Morris, 83 Tex. 14, 18 S. W. 422; Watson v. Rainey, 69 Tex. 319, 6 S. W. 840; Telschow v. House, 10 Tex. Civ. App. 671, 32 S. W. 153, and authorities cited; *ante*, § 373.

†NOTE:—I am indebted to Judge R. D. Rugeley of the Bowie bar, for a valuable paper which has aided me in the preparation of this section. The paper in question has gone far to convince me of the lack of power of a surviving wife to sell the homestead interest of her minor children, especially where the estate proves to be insolvent. [The Author.]

wife there can be no question of his right to sell the same.⁶¹ For the only inhibition to be found anywhere against the owner's selling the homestead is in the case of its belonging to the husband, when he is forbidden to sell except upon the consent of the wife. Where there is no wife the inhibition can have no application. If the wife survives and the homestead be her separate property there is no authority for setting apart any interest whatever therein to any children that may survive their father's death. For the probate homestead of the widow and children is to be set apart from the estate of a deceased person, not a living one. A sale, then, by the owner of the fee is not a sale by the representative of any estate. We have seen that the community property in the hands of the survivor is charged with the debts of the marriage, and that the survivor has authority, whether qualified under the statute as survivor or not, to sell the community property for the discharge of these debts. If the husband be the survivor, there is no reason to say the rule does not obtain with equal force though the property be the homestead of such surviving husband and his minor children, and even though the estate be insolvent. It has been held, and correctly too, that he has the power to sell it for the payment of debts.⁶² His power to thus sell is not derived from article 2226 of the statutes authorizing the survivor upon order of the court to dispose of the community, for this order has reference only to such assets of the estate as are subject to administration. It exists independently of any species of administration and of the article mentioned, and is not affected one way or another by his qualifying under the statute. If the wife survives, and there be no other constituent, the community homestead belonging to her exclusively, she may sell it; or exchange it for another which may itself be exempt.⁶³ But here again her act is not the act of the legal representative of the decedent's estate, but the act of the heir and owner. Where there are surviving minor children as well as widow, and the estate is insolvent, it has also been held that the widow may sell the homestead, having filed the inventory,

⁶¹Brewer v. Wall, 23 Tex. 589;
Tadlock v. Eccles, 20 Tex. 782.

v. Yungst, 65 Tex. 631; Eagan v. Mc-
Whirter, 71 Tex. 567, 9 S. W. 677.

⁶²Watkins v. Hall, 57 Tex. 1; Ashe

⁶³Schneider v. Bray, 59 Tex. 668.

ond, etc.⁶⁴ But the correctness of this holding there is much room to doubt. Now, the administrator is entitled to the possession of such property only of the estate as is not exempted by law from forced sale, and is therefore subject to his administration and to sale for the payment of debts.⁶⁵ The admitted power of the surviving husband to sell the homestead of an insolvent estate where there are minor children is not by virtue of his having qualified as survivor and given bond, but, as before stated, exists independently of administration proceedings altogether; and in selling it he violates no provision either of Constitution or statute. For his minor children do not inherit a homestead privilege in the land simply because it was the homestead of their mother, and as, before her death, they may be deprived of it by a sale by their parents made in accordance with law, so after her death they may be deprived of it by a sale made by their father if it be his separate property, or if it be community property, where the sale is made to pay community debts. Their rights as heirs attach only to the residue after payment of such debts. This is true unless the legislature has somewhere conferred other rights upon them than the ordinary rights of the family homestead and of inheritance of community property; and this the legislature has not done. Nowhere does the act concerning administrations in any way give the minor children, or others, any peculiar or additional rights and privileges in the homestead or other exemptions, in the event of the death of the mother and survival of the father. Then the statutes of administration neither confer nor deny the power of the surviving husband to sell the homestead; and his sale not being as qualified survivor, nor the homestead being any part of the estate for administration, his bond, if he has qualified as such survivor, is not the authority for making such sale, and is hence not a protection to anyone.⁶⁶ But how is the case where the wife survives the husband? The legislature has seen fit to make special provisions for such a contingency, and those provisions evidently were intended to work some sort of change in respect to the rights of those mentioned as its beneficiaries. Where the wife survives

⁶⁴Johnson v. Taylor, 43 Tex. 121;

Ordier v. Cage, 44 Tex. 532.

M. W.—30.

⁶⁵Rev. Stat. art. 1869.

⁶⁶Compare *post*, § 384.

provision is made that the exempted property shall be set apart, or an allowance in lieu of it, to the widow and minor children and unmarried daughters remaining with the family, and that the homestead and other exemptions and allowances are to be delivered to the widow and children or to their guardian as provided by the act. And further that the homestead and other exemptions or allowances, in the event the estate proves to be insolvent, are to belong to such widow and children absolutely, free from the debts of the estate; and further that the homestead shall not be partitioned among its owners so long as the widow sees fit to use or occupy it as a homestead, or the guardian of the children may by order of the proper court be permitted to occupy it for his wards. Now the right of the children, through their guardian, to occupy the homestead, is equal to the right of the widow to occupy it. Both must concur in an abandonment of it before it is subject to a partition among its owners. The children's right may exist where the wife's does not. She may have forfeited her right altogether. The widow cannot by an abandonment subject it to partition where the proper court still permits the guardian of the minor children to occupy it. How, then, can she sell it and thus deny them the right of occupancy? Or how can she sell their interest at all? She owns but a moiety therein, and is a cotenant with the other owners whose rights are equal to hers unless she has special powers by virtue of her qualifying as survivor. For the homestead of the probate law is as much for the benefit of the minor children and unmarried daughters remaining with the family as for the widow. And where the estate proves insolvent it is specially set apart to them freed from all debts save certain ones therein specified. Does the giving of the bond as survivor authorize her? The exempted articles of the estate form no part of the estate for administration, whether the same be administered by an executor, administrator, or surviving widow. Neither of these representatives is entitled to them in his or her representative capacity. The bond is liable and conditioned only that she will faithfully administer the community estate and pay over the surplus, etc. And the exempted property being no part of the estate for administration, as we have already seen, the administrator's sure-

ties are not liable for his conversion of what is no part of the estate.⁶⁷ The bond is no more the authority for the widow's selling than it is for the husband's selling; and in neither case can it be the authority for the reason already stated, that the homestead is no part of the estate to be administered. Then the power to sell in each case must come from some other source. It exists with the husband because of the general power of the survivor to sell community property for the payment of debts, and of the absence of any legislation in any way restricting his right; and does not exist in favor of the surviving widow because by the insolvency of the estate, it is set apart freed from the rights of creditors and charged with the equal right of occupancy by the minor children until its abandonment for such purposes, when it is ready for distribution among its owners. Provisions of the statute apply in the latter case that do not apply in the former. If no distinction is to be made between the rights of the minor children where the wife survives and those cases where the husband survives, then the statute comes to naught, and the direct, statutory grant of homestead privileges and other immunities made to them is meaningless. Where the husband survives their rights are inherited rights; where the wife survives, they are the grant of the law, and they may well be said to "take by purchase and not by descent."

While the surviving husband may sell the homestead to pay community debts, or mortgage it for such purpose,⁶⁸ he cannot, where no such debts exist, sell or encumber it for the support of the minor children.⁶⁹

§ 382. Liens.

From the earliest times the homestead of a decedent has been held liable for the unpaid purchase money. By statute already noticed it is liable only for unpaid purchase money, taxes, and improvements contracted for in such manner as to be binding

⁶⁷Woerner, *American Law of Administration*, 212; Brandt, *Suretyship*, §§ 584, 585; Pace v. Pace, 19 Fla. 438; Reeves v. Steele, 2 Head, 647.

⁶⁸Watts v. Miller, 76 Tex. 13, 13 S.

W. 16; Lacy v. Rollins, 74 Tex. 566, 12 S. W. 314.

⁶⁹Thompson v. Cragg, 24 Tex. 597; Bell v. Schwarz, 56 Tex. 353. See *post*, § 384.

upon the wife.⁷⁰ Since the inhibition now in our Constitution concerning liens upon the homestead, few questions can arise; formerly there were many. But now, as then, all liens not within the three classes named are subordinate to the rights of the surviving widow and children.⁷¹ But the probate homestead of the widow and children is subordinate to all claims for the purchase money, to mortgages executed upon the property to pay off such purchase money,⁷² to all claims for taxes, and to liens for improvements contracted for in accordance with law.⁷³ Nor does the existence of a lien upon property prevent its being appropriated for exemptions or allowances, unless such lien be a vendor's lien,⁷⁴ or one acknowledged in such manner as to be binding upon the wife, and not then, if the estate prove to be insolvent.⁷⁵

§ 383. Suits By and Against Survivor.

In proportion to the enlarged powers of the survivor as an administrator over those of the ordinary administrator are the privileges of suing and liabilities of being sued increased. The survivor, unlike the ordinary administrator, is not so closely under the scrutinizing eye of the probate court; he need not ask permission to sue, nor need creditors obtain permission to sue him. They need not present their claims to survivor or court for allowance,⁷⁶ as the court, after delivering into the hands of the survivor the estate, has practically nothing to do with his management of it. The court has the power, however, where a creditor's claim has not been paid at the expiration of one year, to cause the survivor to be cited to render a report of the condition of his estate, to the end that the court may determine whether or

⁷⁰*Ante*, § 371; Rev. Stat. art. 2060.

L. Asso. 85 Tex. 215, 20 S. W. 116.

⁷¹*Robertson v. Paul*, 16 Tex. 472; *Giddings v. Crosby*, 24 Tex. 295; *Blair v. Thorp*, 33 Tex. 38; *McLane v. Paschal*, 47 Tex. 365; *Black v. Rockmore*, 50 Tex. 88; *Abney v. Pope*, 52 Tex. 288; *Griffie v. Maxey*, 58 Tex. 210; *McLane v. Paschal*, 74 Tex. 20, 11 S. W. 837.

⁷²*Telschow v. House*, 10 Tex. Civ. App. 671, 32 S. W. 153.

⁷³*Fossett v. McMahan*, 86 Tex. 652, 26 S. W. 979, 998.

⁷⁴*Krueger v. Wolf*, 12 Tex. Civ. App. 167, 33 S. W. 663. Compare *ante*, § 373.

⁷⁵*Osborn v. Robinson* (Tex. Civ. App.) 35 S. W. 327.

⁷⁶*Hensel v. International Bldg. &*

not there are assets of the estate subject to the payment of such claim. If it appears that there are such assets, and the claim is within the jurisdiction of the county court, the action is transferred to the civil docket of that court, and the suit maintained as other civil causes. If the amount exceeds the jurisdiction, then the creditor is relegated to his action in the district court.⁷⁷ But indeed it is doubtful if even this application to the court to compel an account is necessary to authorize a suit by a creditor. Under the article authorizing it the probate court can only discover the wrong; it cannot give redress. If it direct the survivor to pay, that person may force a suit by ignoring the order, and in such suit make any defense that his report to the probate court might have embraced. The act does not define the creditor to this remedy.⁷⁸ Nor is it necessary that the court should authorize the survivor to maintain a suit for the recovery of the property of his estate. The general order directing him to control, manage, and dispose is sufficiently comprehensive to embrace the power. He may do this without administration,⁷⁹ and certainly his qualifying under the statute will not take away the power. If judgment be recovered against a survivor for a community debt, execution can issue to be levied upon the community property, whether the execution be so directed or not.⁸⁰

§ 384. Individual Liability of Survivor and Suits on Bond.

Independent of any administration, the surviving husband is liable for the community debts. Not so with the wife.⁸¹ She may be sued as survivor, not because they are her debts, but because she has undertaken to administer the estate for the purpose of paying the debts, and to the extent that she has in her hands assets subject thereto, she is liable. The liability not being a personal one, the judgment should not be against her in her individual capacity, but only as representative of the estate, to the end that the funds of the estate only

⁷⁷Nichols v. Oliver, 64 Tex. 647.

⁷⁸Hollingsworth v. Davis, 62 Tex.

⁷⁹Huppman v. Schmidt, 65 Tex. 438.

583; Frank v. DeLopez, 2 Tex. Civ. App. 245, 21 S. W. 279.

⁸¹Leatherwood v. Arnold, 66 Tex. 414, 1 S. W. 173.

⁸⁰Post, § 398.

may be taken.⁸² While the pleadings should show an excuse for suing her,⁸³ that is a liability, yet it cannot be material in such a suit to prove that there are assets of the estate, since if there are none she is unharmed.⁸⁴ But the husband may be sued regardless of the existence of community assets, for the very good reason that the debts are his debts individually, and his separate estate, as well as the assets of the community estate, is liable. Either surviving husband or wife may create a personal liability to either creditors or heirs by a conversion of the funds of the estate, and if a devastavit be shown both survivor and bondsmen are liable at the suit of any person injured.⁸⁵ Which suit may be brought in any county where any one of the obligors resides.⁸⁶ The injured person may be a creditor, distributee, or an administrator *de bonis non*.⁸⁷ And the liability of the survivor and his bondsmen applies to all the property of the estate whether the same has been inventoried or not.⁸⁸

We have seen that the surviving husband may sell the community homestead for the purpose of discharging community debts, and to the demands of others interested therein the discharged debt is a complete answer. But if he sells it and converts the proceeds to his own use, he is certainly liable to the other owners, if any, for their proportional part of the same; and it has been held that his bondsmen are liable as well.⁸⁹ But if we were correct in our observations with reference to the widow's lack of power to sell the homestead,⁹⁰ the same rule would not apply to her bondsmen. While, of course, she would be liable personally for a conversion of property belonging to her children, her bondsmen would not unless the property belonged properly to the estate. The distinction between the devolution of the homestead upon the death of the wife and of the husband,

⁸²Tucker v. Brackett, 28 Tex. 337; Wheeler v. Selvidge, 30 Tex. 407.

⁸³Frank v. DeLopez, 2 Tex. Civ. App. 245, 21 S. W. 279.

⁸⁴Bonnell v. Prince, 11 Tex. Civ. App. 399, 32 S. W. 855.

⁸⁵Brackett v. Devine, 25 Tex. Supp. 195; Frank v. DeLopez, 2 Tex. Civ. App. 245, 21 S. W. 279.

⁸⁶Citizens' Nat. Bank v. Jones, 22

Tex. Civ. App. 45, 54 S. W. 405.

⁸⁷Brown v. Seaman, 65 Tex. 628.

⁸⁸Richardson v. Overleese, 17 Tex. Civ. App. 376, 44 S. W. 308.

⁸⁹Linskie v. Kerr (Tex. Civ. App.) 34 S. W. 765; Richardson v. Overleese, 17 Tex. Civ. App. 376, 44 S. W. 308.

⁹⁰*Ante*, § 381.

which we have already sufficiently noticed, is probably sufficient to authorize this difference between the liability of the bondsmen of the husband and those of the widow. But it will be observed that in the cases cited as authority for holding the husband's bondsmen liable for his disposition of the homestead it does not appear that any question arose concerning the power of the husband to sell the homestead as representative of the estate, and, for reasons already stated, the homestead may be assets of the estate where the husband survives, whilst it may not if the wife survives. In an action on the bond, to entitle one to recover, a breach of its conditions to "faithfully administer such estate and pay over one half of the surplus thereof, after payment of all debts with which the whole is properly chargeable," must be alleged and proved. It is not sufficient to show merely that the principal had received of the community sufficient property above the exemptions to pay such claim.⁹¹

§ 385. Defective and Irregular Proceedings.

The decisions have been somewhat liberal in supporting the efforts of the survivor to comply with the law regulating community administrations;⁹² a substantial compliance with the terms of the statute being held to be sufficient. The survivor sold property on the day after the filing of the inventory and appraisement and before the court had "recorded" such inventory and appraisement; the sale was valid.⁹³ Under the law of 1856, the failure to return the appraisement was not material,⁹⁴ but under a subsequent act it was said to be essential.⁹⁵ Mere irregularities in the mode and manner of making the inventory and appraisement will not vitiate a sale.⁹⁶ That the bond does not equal in amount the value of the community estate does not affect the right of the survivor to manage and dispose;⁹⁷ nor will the fact that the wife did not sign and swear to her inventory render her deed executed as survivor open to collateral attack.⁹⁸

⁹¹Bergstroem v. State, 58 Tex. 92.

⁹²Her. Prob. Guide, 450.

⁹³Dawson v. Holt, 44 Tex. 174.

⁹⁴Cordier v. Cage, 44 Tex. 532.

⁹⁵Kirkland v. Little, 41 Tex. 456.

⁹⁶Pratt v. Godwin, 61 Tex. 331.

⁹⁷Jordan v. Imthurn, 51 Tex. 270.

⁹⁸Green v. Grissom, 53 Tex. 432; Long v. Walker, 47 Tex. 173; Withrow v. Adams, 4 Tex. Civ. App. 438, 23 S. W. 437.

But a bond not conditioned to faithfully administer the estate and pay over the surplus, as provided by law, is insufficient to authorize a sale. A bond obligating the widow to faithfully perform her duties as administratrix of her husband's estate is not such a bond.⁹⁹

Again, an entry by the judge upon his docket of the approval of the inventory, appraisement, and bond of the survivor authorizes such survivor to act, notwithstanding the law requires the order approving such inventory, appraisement, and bond to be entered upon the minutes of the court, as well as those instruments themselves when approved; and further, that the order should authorize such survivor to manage, control, and dispose of the community property in accordance with the provisions of law; such approval by the judge being considered the authority for the survivor to act, and sufficient authority as well for the entry in the minutes of the legal effect of such order.¹⁰⁰ And an order made in vacation requiring additional security, but which is never entered in the minutes, will not be admissible for the purpose of showing that the survivor had no authority, after such entry, to act.¹ But where the only authority for the surviving wife's acts was her application under the statute for the appointment of appraisers, and an instrument sworn to by two of the three appraisers, purporting to be an appraisement of all the property owned by the deceased, and there were no orders in any manner authorizing her to act, she was not lawfully authorized to represent the community of herself and deceased husband as survivor under the statute.²

Where a widow appeared in court in a pending cause and consented that judgment should be rendered against her in such manner as amounted to an admission of her liability as survivor, the court presumed that she had been regularly appointed and qualified, nothing to the contrary appearing.³

Proceedings regular within themselves do not constitute evidence that the person making the application and receiving the

⁹⁹Wilson v. Fields (Tex. Civ. App.)
50 S. W. 1024.

¹⁰⁰Green v. White, 18 Tex. Civ.
App. 509, 45 S. W. 389.

¹Ibid.

²Busby v. Davis, 57 Tex. 323.

³Womack v. Shelton, 31 Tex. 592.

appointment as community survivor is really the wife of the person named in the application as the deceased.⁴

§ 386. Joint Administrations.

While it is out of the ordinary for a court to grant administration upon two estates, or upon the estates of two deceased persons, nevertheless, there is nothing in the law forbidding it, and where it can be done, no valid objection can be urged against it. Especially in the case of husband and wife where the estate is often largely community, little difficulty can be experienced in its administration in such manner. A proper observance of the liability of each estate for its own debts is the principal thing to be noticed.⁵

§ 387. Closing up of Community Administration; Distribution.

After the lapse of twelve months any person entitled to the deceased's share of such estate, or any part thereof, may compel a distribution, as in other administrations,⁶ and the district court has power to compel such survivor to make the distribution,⁷ or it may be done in the county court as in other administrations.⁸ So, too, there may be a closing up of the administration, when in response to a citation issued at the instance of a creditor the survivor's report shows that there remain no assets subject to the payment of debts, and the court is satisfied that the estate has been fairly administered in accordance with law; an order may then be entered declaring such administration closed.⁹ But it is held that there exists no authority for the survivor to seek a discharge at his own instance; that the power to compel a distribution by one interested does not at all imply the power of the survivor to seek his own discharge.¹⁰

⁴Roche v. Lovell, 74 Tex. 191, 11 S. W. 1079.

⁵Grande v. Herrera, 15 Tex. 533; Stephenson v. Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383; Halbert v. Carroll (Tex. Civ. App.) 25 S. W. 1102; Williams v. Howard, 10 Tex. Civ. App. 527, 31 S. W. 835.

⁶Rev. Stat. art. 2238; Her. Prob. Guide, 467.

⁷Huppman v. Schmidt, 65 Tex. 583; Guy v. Metcalf, 83 Tex. 37, 18 S. W. 419.

⁸McGillivray v. Eggleston, 11 Tex. Civ. App. 35, 31 S. W. 539.

⁹Rev. Stat. art. 2232.

¹⁰Pressler v. Wilke, 84 Tex. 344, 19 S. W. 436.

And it would seem that, considering the very great latitude allowed a community survivor in the matter of unrestricted conveyance of the community estate, and the complete release thereof to him upon the sole security of the bond, that his liability should not be determined except upon a full hearing by some tribunal having jurisdiction, where all the parties interested may be heard. The county court not having authority to hear such application, it should not grant such discharge.¹¹

Where the wife administers, her authority ceases upon her marrying again, and the estate becomes subject to administration as in other cases,¹² and a judgment obtained against her after such marriage is no authority for an execution against the community property.¹³ After such marriage her right to make conveyances of the estate ceases, and she becomes a trustee with respect to the estate, for the benefit of its owners.¹⁴

It is the surplus remaining after payment of just debts with which the property is chargeable, that the distributees are entitled to receive. They cannot demand this in kind, for we have seen that the survivor may sell freely, being responsible upon his bond for the value of the estate. And it has been held that the distributees were not restricted in their rights to an action on the bond for a conversion of the property of the estate, but might, if they desired, maintain an action to recover the profits and gains arising from an employment by the survivor of the community funds.¹⁵

Upon the recovery of sanity of the insane husband or wife, an account must be rendered and all proceedings in the probate court cease. This implies a restoration of the ward to his community rights.

Where the community estate of the deceased husband and surviving wife is in process of administration under the general administration laws, and the wife dies, such death does not withdraw the community estate from administration, but the acts of the administrator had thereafter are valid.¹⁶

¹¹Her. Prob. Guide, § 690, p. 484.

¹²Rev. Stat. art. 2237.

¹³Pucket v. Johnson, 45 Tex. 550.

¹⁴Worst v. Sgitcovich (Tex. Civ. App.) 46 S. W. 72.

¹⁵Worst v. Sgitcovich (Tex. Civ. App.) 46 S. W. 72. See also Rev. Stat. art. 2228; *ante*, § 375.

¹⁶Lawson v. Kelley, 82 Tex. 457, 17 S. W. 717.

CHAPTER XXX.

SAME CONCLUDED; RIGHTS AND LIABILITIES OF SURVIVOR WITHOUT ADMINISTRATION.

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|---|---|
| § 388. When a Community Administration is Unnecessary. | § 394. Carrying out Contracts Entered into during Marriage. |
| § 389. The Relation of the Survivor to the Estate; Nature of His Holding. | § 395. Purchasers from Survivor; Equities. |
| § 390. Comparative Rights of Deceased's Administrator and Survivor. | § 396. Sales and Other Transactions Concerning Separate Property. |
| § 391. Partition of Community Property from Estate of Deceased; Statute. | § 397. Equities between Survivor and Children. |
| § 392. Sales, Conveyances, and Encumbrances by Survivor. | § 398. Suits By and Against Survivor. |
| § 393. — Burden of Proof to Show Authority; Presumptions. | § 399. The Same Subject. |
| | § 400. Remarriage of Widow. |

§ 388. When a Community Administration is Unnecessary.

“Where the husband or wife dies intestate, or becomes insane having no child or children, and no separate property, the common property passes to the survivor, charged with the debts of the community, and no administration therein or guardianship of the estate of the insane wife or husband shall be necessary.”¹ The survivor in such case need not take any steps whatever in the probate court for there are no reasons requiring the appraisement, inventory, and bond. The bond is for the protection of distributees after debts paid. Where there are no other heirs or distributees, and the property can go to no other person, there is no need of his obligation to deliver the residue of the property to the persons entitled to receive it. Creditors have the prop-

¹Rev. Stat. art. 2220; *ante*, § 375.

erty itself for their protection. Nor need the sane spouse take any action in the probate court if there be no children and no separate estate of the insane consort. The community passes to the sane spouse subject only to the debts of the community.² While the passing of the community property in the event of the insanity of one of the spouses is declared in precisely the same words as in the case of death, yet, considering other portions of the act, it would indicate that the holding of the sane spouse was absolute if the affliction continued, but otherwise in the event sanity was restored. Witness the provision that all action in the probate court shall cease upon the recovery of sanity, in those cases where guardianship proceedings are necessary;³ and the sections being *pari materia* should be so construed.

Nor is a community administration essential at all where the deceased spouse leaves a separate estate. In another section we shall see that provision is made for a partition of the community estate from the estate of the deceased being administered by an executor or administrator.⁴

§ 389. The Relation of the Survivor to the Estate; Nature of His Holding.

Where there are no children, of course, the survivor becomes absolute owner of the community estate charged only with the debts of the community. Where there are surviving children, he is owner in his own right of the half, and, for the purpose of adjusting debts and encumbrances, entitled to the possession of the whole for a reasonable time. The holding during this time is in trust for those jointly interested with himself in the ultimate distribution of the residue, after debts paid. He is entitled also to retain the proper and reasonable expenses of thus administering the property.⁵ But he has no authority to use the estate for his own private gain, nor even to speculate upon it at all. His holding is similar to that of any other trustee,⁶ and persons dealing with him, having notice or being chargeable with notice, can acquire no title to the interest owned by chil-

²Compare *ante*, §§ 31, 375.

³Rev. Stat. art. 2238a.

⁴*Post*, § 391.

⁵*Cochran v. Sonnen* (Tex. Civ. App.) 26 S. W. 521.

⁶*Lumpkin v. Murrell*, 46 Tex. 51.

en.⁷ Being a cotenant with the children, he is not liable to them for the reasonable use of the property.⁸

390. Comparative Rights of Deceased's Administrator and Survivor.

Where there are no children but a separate estate of the deceased, the husband surviving, he is entitled to the absolute custody of the community, and the deceased wife's administrator has no authority whatever over it;⁹ this for the reason primarily that he is the owner outright of such estate, charged, of course, with the community debts, if any. But his right to the custody and control of the community of himself and deceased wife does not seem to be limited to those cases where there are no surviving children. During the marriage the husband contracts the debts for the community, and they are in consequence his debts; after the death of the wife he is still liable for them as before. Not only is the community property liable, but his separate estate as well may be taken for their payment.¹⁰ But the case is different with the wife should she survive. She is not liable individually during the husband's lifetime, nor is she liable after his death. It is but proper and reasonable, then, that the surviving husband should be free to continue the control and management of the community property, rather than the administrator or other representatives of the deceased wife's estate.¹¹ Nor will the fact that the husband has abandoned the wife in such manner as to authorize her to act as a *feme sole* during her life necessarily authorize her administrator to control the community rather than the surviving husband. His rights are yet superior for the reasons given above.¹² This same reasoning will require a recognition of the superior rights of the administrator of the deceased husband over the surviving wife, to the custody and management of the community property.¹³ She

⁷See *post*, § 395.

⁸Akin v. Jefferson, 65 Tex. 137; Burns v. Falls (Tex. Civ. App.) 56 S. W. 576.

⁹Wall v. Clark, 19 Tex. 321.

¹⁰Carter v. Conner, 60 Tex. 52; *ante*, § 384.

¹¹Moody v. Smoot, 78 Tex. 119, 14

S. W. 285; Carleton v. Goebler (Tex.) 58 S. W. 829.

¹²Cullers v. May, 81 Tex. 110, 16 S. W. 813.

¹³See Tucker v. Brackett, 28 Tex. 337; Moke v. Brackett, 28 Tex. 443; Hollingsworth v. Davis, 62 Tex. 438.

cannot even sell for the payment of debts during an administration upon her deceased husband's estate;¹⁴ the power is with the administrator¹⁵ or executor.¹⁶ Not being authorized to sell for payment of debts, she could not, of course, make a gratuitous disposition where there were such debts, and the administrator's subsequent sale for the payment of such debts would pass a superior title.¹⁷ For if there were no surviving children, but debts, she could not take the property as owner to the prejudice of such creditors. The superior rights of the husband's administrator are analogous to the deceased's superior rights during life. But see next section.

§ 391. Partition of Community Property from Estate of Deceased; Statute.

“When any husband or wife shall die leaving any common property, the survivor may, at any time after letters testamentary or of administration have been granted, and an inventory, appraisement, and list of the claims of the estate have been returned, make application in writing to the court which granted such letters for a partition of such common property, which application shall be acted upon at some regular term of the court.¹⁸ If upon the hearing of such application there appear to be any such common property, and such surviving husband or wife shall execute and deliver to the county judge an obligation with two or more good and sufficient sureties, payable to and approved by said county judge, for an amount equal to the value of his or her interest in such common property, conditioned for the payment of one half of all debts existing against such common property, then the county judge shall proceed to make a partition of said common property into two equal moieties, one to be delivered to the survivor and the other to the executor or administrator of the deceased; and all the provisions of this chapter respecting the partition and distribution of estates shall apply to any partition made under the provisions of this article, so far as the same

¹⁴Corzine v. Williams, 85 Tex. 499, 22 S. W. 399.

¹⁵Soye v. McCallister, 18 Tex. 80; Simmons v. Blanchard, 46 Tex. 266; Murchison v. White, 54 Tex. 78.

¹⁶Carleton v. Goebler (Tex.) 58 S. W. 829.

¹⁷Nix v. Mayer (Tex.) 2 S. W. 319.

¹⁸Rev. Stat. art. 2183.

may be applicable.¹⁹ Whenever any such partition shall be made a lien shall exist upon the property delivered to such survivor to secure the payment of the aforesaid obligation, and such obligation shall be filed with the clerk and recorded in the minutes of the court, and any creditor of said common property may sue in his own name on such obligation, and shall have judgment thereon for one half of such debt as he may establish, and for the other half he shall be entitled to be paid by the executor or administrator of the deceased.²⁰ Until any such partition of common property is applied for and made as herein provided, the executor or administrator of the deceased shall have the right, and it shall be his duty, to recover possession of all such common property, and hold the same in trust for the benefit of the creditors and others entitled thereto under the provisions of this title."²¹

How far this statute, which is a recent one (1895), modifies the rule as above announced remains to be seen. It is very plain that in some respects it supersedes it, and gives in all cases the power to the executor or administrator to reduce the common property to possession and hold the same in trust for those entitled to receive the same whether as creditors or heirs. And the legislature doubtless had in mind the adoption of a rule applicable alike to the administration of such property whether the same be occasioned by the death of the husband or by the death of the wife, rather than the different rules applicable as noticed in the foregoing section.

§ 392. Sales, Conveyances, and Encumbrances by Survivor.

All the acts permitting a community administration have had for their object the enlargement of the powers of the survivor over those of ordinary administrators, as well as the protection of creditors and distributees, and were not intended to lessen the rights and powers which a survivor without administration might exercise. It is plain from what has already been said that a survivor without any character of administration whatever may, in a measure, control and dispose of the community

¹⁹Ibid. art. 2184.

²⁰Ibid. art. 2186.

²¹Ibid. art. 2185.

property. Since the property descends subject to the debts of the community, and an administration is only designed to facilitate the payment of such debts, the survivor, whether husband or wife, may freely sell and convey for the payment of those debts which, were there an administration, the court might properly direct to be paid. In such case there is no need of the appraisement, inventory, and bond; for distributees who are designed to be protected by these measures have rights only in the residue after such debts are paid.²² Subject to the statutory charge for community debts, the community property, in the absence of administration, descends and vests in the heirs of the deceased in the manner already pointed out, and they may bring suit for partition.²³ The surviving husband or wife may do with his own share of the community as he pleases,—that is, he may sell, donate, or mortgage it;²⁴ for it is his own and other heirs can have no interest in it, save in those cases which will be readily called to mind in which children may have a possible interest in property as being exempt. But such survivor cannot so deal with the portion belonging to the children; he has no authority to sell,²⁵ donate,²⁶ mortgage, or otherwise bind it.²⁷ But the authority for disposing of the entire estate is only acquired by qualifying as survivor, or the existence of facts equitably requiring such action. It will not do to say the survivor is authorized to dispose of the property belonging to the children according to their necessity, for this would in effect make such survivor guardian of their estate without placing the same under the con-

²²Jones v. Jones, 15 Tex. 143; Good v. Coombs, 28 Tex. 35; Walker v. Howard, 34 Tex. 478; Cooper v. Singleton, 19 Tex. 260; Dawson v. Holt, 44 Tex. 174; Johnson v. Harrison, 48 Tex. 257; Wenar v. Stenzel, 48 Tex. 484; Sanger v. Moody, 60 Tex. 96; Veramendi v. Hutchins, 48 Tex. 531; Wilson v. Helms, 59 Tex. 680; Watkins v. Hall, 57 Tex. 1; Ashe v. Yungst, 65 Tex. 631; Davis v. McCartney, 64 Tex. 584; Fagan v. McWhirter, 71 Tex. 567, 9 S. W. 677; Withrow v. Adams, 4 Tex. Civ. App. 438, 23 S. W. 437; McDaniel v. Har-

ley (Tex. Civ. App.) 42 S. W. 323; Allen v. Bright (Tex. Civ. App.) 23 S. W. 712.

²³Akin v. Jefferson, 65 Tex. 137.

²⁴Grothaus v. De Lopez, 57 Tex. 670.

²⁵Hair v. Wood, 58 Tex. 77; Duncan v. Rawls, 16 Tex. 478.

²⁶McClure v. Bryant, 18 Tex. Civ. App. 141, 44 S. W. 3; Parker v. Stephens (Tex. Civ. App.) 39 S. W. 164.

²⁷Stone v. Ellis, 69 Tex. 325, 7 S. W. 349; Meyer v. Opperman, 76 Tex. 105, 13 S. W. 174.

trol of the court.²⁸ While the conveyance must be for the bona fide purpose of paying a community debt, and not for the purpose of defrauding anyone out of his just rights, it is not required that the property conveyed be not greater in value than the debt settled. For circumstances may be such as that a debt may be paid only by making sale of property of greater value. If the sale be in good faith for the purpose of discharging the debt, it is valid.²⁹ Exempt property,³⁰ and even the homestead, where the husband survives,³¹ may be thus disposed of.³²

A deed executed by a widow as administratrix of her husband, in pursuance of a void order of the court, cannot be given the force of a deed executed by her as survivor.³³

Again, a deed by the widow and child, reciting that they were the sole heirs of deceased, excludes the idea that the sale was by the widow as survivor, and no presumption arises, forty years thereafter, that the sale was for the payment of community debts.³⁴

§ 393. — Burden of Proof to Show Authority; Presumptions.

Not only is it true that the survivor cannot dispose of the community for his personal or individual interests, but it is further true that the purchaser from him must at all times be prepared to show that he has not done so. In other words, the burden is upon such purchaser to show that the circumstances were such as to authorize the sale.³⁵ But the purchaser may be relieved of this burden if so great a length of time has elapsed as to render it improbable that direct proof of the power can be offered. Upon this question it is said in *Hensel v. Kegan*, 79 Tex. 347, 15 S. W. 275: "The rule is familiar and has been repeatedly recognized in our state, that the power to execute a

²⁸*Littleton v. Giddings*, 47 Tex. 109.

²⁹*Wenar v. Stenzel*, 48 Tex. 484.

³⁰*Nelms v. Nagle* (Tex. Civ. App.) 35 S. W. 60.

³¹*Watts v. Miller*, 76 Tex. 13, 13 S. W. 16; *Hensel v. International Bldg. & L. Asso.* 85 Tex. 215, 20 S. W. 116; *Burkitt v. Key* (Tex. Civ. App.) 42 S. W. 231.

M. W.—31.

³²*Shannon v. Gray*, 59 Tex. 252; *Watkins v. Hall*, 57 Tex. 1. See *ante*, § 381.

³³*Houston v. Killough*, 80 Tex. 296, 16 S. W. 56.

³⁴*Mariposa Land & Cattle Co. v. Silliman*, 87 Tex. 142, 26 S. W. 978.

³⁵*Eastham v. Sims*, 11 Tex. Civ. App. 133, 32 S. W. 359; *Moody v. Butler*, 63 Tex. 210.

deed will be presumed generally in those cases where the conveyance would be evidence as an ancient instrument without proof of its execution, and purports to have been executed under a power. . . . In *Veramendi v. Hutchins*, 48 Tex. 532, it was said in effect that the presumption might obtain, in the absence of proof to the contrary, after a sufficient lapse of time, that the facts existed in that case which authorized the sale of the community property by the survivor of the community,—in that case the husband. The reason upon which the rule is founded, that the power will in such cases be presumed, is the difficulty of producing direct proof of such power. This reason, we think, applies with greater force in a case like the present [a sale by survivor after nearly forty years] than in those cases where the power is presumed in support of a deed purporting to be executed by a power, because in the cases last mentioned the power may itself be a matter of record. In the former the facts presumed to exist, authorizing the sale, and which are analogous to the power presumed, exist in parol.”³⁶ But this has reference to the time intervening between the transaction of conveyance and suit, and not to that intervening between the death of the deceased spouse and the conveyance. For very naturally the greater the lapse of time between the death and the conveyance, the greater the improbability of the existence of debts. Not that there is a presumption of debts immediately upon the death of the deceased member of the partnership which decreases as time advances, for this we have seen is not the case, but that if any presumption whatever is indulged it will be that after a reasonable time the debts have been paid, and against the power. Especially is this the case where there has been an administration which purports to have closed up the affairs of the estate.³⁷ Time before conveyance will never raise a presumption of debts; it will have a contrary effect. This presumption against debts is aided by proof that the parties against whom they are alleged

³⁶See also *Box v. Word*, 65 Tex. 166; *Duncan v. Rawls*, 16 Tex. 478; *Auerbach v. Wylie*, 84 Tex. 619, 19 S. W. 856, 20 S. W. 776; *Hasseldenz*

v. Dofflemyre (Tex. Civ. App.) 45 S. W. 830.

³⁷*Corzine v. Williams*, 85 Tex. 499, 22 S. W. 399.

to have existed so long were economical and prompt in the payment of debts.³⁸

§ 394. Carrying out Contracts Entered into during Marriage.

Akin to the right to sell for the payment of debts is the right of a survivor to make conveyances in pursuance of a bond or other obligation entered into during the marriage. Indeed, it partakes, not only of the nature of a debt, but there is a specific agreement to satisfy it with certain property. The right of the surviving husband to fulfil such contracts has always been recognized.³⁹ Nor will the fact that the property is the homestead of the family defeat the power of the surviving husband to convey in satisfaction of the bond. It is not only the right of the survivor, but the obligation is enforceable against him; for upon the wife's death the inhibition against the husband's disposing of the homestead is removed.⁴⁰ True, the obligation cannot be enforced during the lifetime of the wife,—neither against the husband nor the wife,—for she cannot be compelled to join in the conveyance against her wishes;⁴¹ yet the husband may lawfully make such agreement and be sued for damages for its breach, or upon his wife's death be held to a specific performance.⁴² Nor is there anything in the probate law which in any way prevents such disposition of the homestead; the probate homestead is set apart, not to the survivor and minor children, but to the widow and minor children, unmarried daughters remaining with the family, *et cetera*. The laws of descent cannot affect the question. But the right of the widow to so convey the community, and especially the homestead, is not so clear. Much of the argument in favor of the husband's power does not apply to her at all. Upon the husband's death the homestead and other exempt property or allowances in lieu thereof are set apart to the widow and children, and may not be sold except for certain enumerated purposes, and a bond for a conveyance is not one of them. If the contract to convey has been properly

³⁸Moody v. Butler, 63 Tex. 210.

⁴⁰Brewer v. Wall, 23 Tex. 585.

³⁹Stramler v. Coe, 15 Tex. 211;

⁴¹*Ante*, §§ 122, 261.

Primm v. Barton, 18 Tex. 206; Long v. Walker, 47 Tex. 173; Garnett v. Jobe, 70 Tex. 696, 8 S. W. 505.

⁴²Brewer v. Wall, 23 Tex. 585; Allison v. Shilling, 27 Tex. 450; Wright v. Hays, 34 Tex. 253.

acknowledged by the wife, and the property be such as that the children of the marriage have no interest therein under the probate statutes, as where it is neither exempt nor needed to make up the allowances in lieu, or where it is her separate estate, then no reason is apparent why the same may not be enforced.

§ 395. Purchasers from Survivor; Equities.

The law will not enjoin upon a purchaser from the survivor the duty of seeing that the purchase money is applied to the payment of the community debts. It is only required that he have no notice, actual or constructive, of an intention to misapply the proceeds, and that there be no collusion or fraud to which he is a party.⁴³ The power of the survivor is a general power to sell for the payment of any debt which the estate may owe. It is not a special and limited power; hence the purchaser, if he buys in good faith, may rely upon his title thus acquired whether the proceeds be actually applied to such debts or not. But if he has actual notice of the intention to sell for a purpose other than that of the payment of debts, or of facts which in law would amount to such notice, then he cannot expect to take a good title,⁴⁴ for everyone is held to a knowledge of the laws of descent and distribution, and therefore to know that a survivor can sell only his portion of the estate for a purpose other than the payment of a community debt.⁴⁵ Back of this, however, it must be observed, there must be notice, actual or constructive, of the existence of the equities of children whose rights are thus to be affected. It is the familiar rule that one who in good faith and for valuable consideration acquires the legal title will prevail over one asserting an equitable title, in the absence of proof of notice of such equities. So, if one purchases from a survivor without notice of the equities of children, and without notice of any facts which would in law charge him with such notice, he will be protected.⁴⁶ And the protection will be given to one who in ignor-

⁴³Sanger v. Moody, 60 Tex. 96; Cage v. Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180; Her. Prob. Guide, 439.

⁴⁴Eastham v. Sims, 11 Tex. Civ. App. 133, 32 S. W. 359.

⁴⁵Gurley v. Dickason, 19 Tex. Civ. App. 203, 46 S. W. 53.

⁴⁶McBride v. Moore (Tex. Civ. App.) 37 S. W. 450; Allen v. Bright (Tex. Civ. App.) 23 S. W. 712; Brackenridge v. Rice (Tex. Civ.

ance of such equities purchases from one having notice of them.⁴⁷ And a purchaser from the administrator of the husband, having no notice of the equities of the deceased wife's children, will also be protected; and the burden is not upon him to show that he did not have such notice.⁴⁸ The filing of an inventory, appraisal, and bond by the survivor after a sale of property will not amount to constructive notice to one who thereafter purchases from the survivor's vendee;⁴⁹ but it has been held that where the land was a grant of "a league and labor," it was sufficient to put the vendee upon notice of the equitable rights of heirs "because a league and labor of land could only be granted to the head of a family, and the head of a family implied marriage and a wife."⁵⁰

Property acquired during the marriage, the deed to which is taken in the name of either spouse with nothing showing its separate character, is presumed upon the death of either party to be community property, and a purchaser from the survivor without notice that such is not true will be protected, notwithstanding it may have been in truth the separate property of the deceased.⁵¹ Nor would it be equitable to permit children to question the validity of a sale where they have received their just portions in any manner,⁵² whether such vendees are bona fide purchasers for value or not.⁵³ Again, if the sale be without authority, and the heirs be not settled with, since it passes the interest of the survivor,⁵⁴ equity would require that upon partition the bona

App.) 30 S. W. 588; *Wren v. Peel*, 64 Tex. 374; *Mangum v. White*, 16 Tex. Civ. App. 254, 41 S. W. 80; *Garner v. Thompson*, 2 Posey Unrep. Cas. (Tex.) 233.

⁴⁷*Davis v. Harmon*, 9 Tex. Civ. App. 356, 29 S. W. 492; *Hall v. Gwynne*, 4 Tex. Civ. App. 109, 23 S. W. 289.

⁴⁸*Saunders v. Isbell*, 5 Tex. Civ. App. 513, 24 S. W. 307.

⁴⁹*Davis v. Harmon*, 9 Tex. Civ. App. 356, 29 S. W. 492.

⁵⁰*Hill v. Moore*, 85 Tex. 335, 19 S.

W. 162; *Randolph v. Junker*, 1 Tex. Civ. App. 517, 21 S. W. 551.

⁵¹*Sanburn v. Schuler*, 3 Tex. Civ. App. 629, 22 S. W. 119.

⁵²*Long v. Moore*, 19 Tex. Civ. App. 363, 48 S. W. 43.

⁵³*Brown v. Elmendorf*, 87 Tex. 56, 26 S. W. 1043.

⁵⁴*Frisby v. Withers*, 61 Tex. 134; *Finn v. Williamson*, 75 Tex. 336, 12 S. W. 852; *Masterson v. Stevens* (Tex. Civ. App.) 37 S. W. 364, Reversed on other grounds in 90 Tex. 417, 39 S. W. 292, 921.

fide purchaser be protected as far as possible.⁵⁵ When the purchaser has shown the existence of community debts of such amount as to reasonably demand the sale, he has shown, *prima facie*, the authority for selling,⁵⁶ and if fraud,⁵⁷ or notice of equities,⁵⁸ be relied upon to avoid the conveyance, the burden of proving it is upon the party asserting.⁵⁹

§ 396. Sales and Other Transactions Concerning Separate Property.

No court has ever undertaken to say that by the death of one spouse the other lost any of his powers over his separate estate. There is no principle of law forbidding such owner to sell, mortgage, or otherwise dispose of his own. It has been supposed by some that it was contrary to the genius of our laws to permit the survivor to mortgage the homestead, but even this has no just foundation in reason or authority; for there is nothing in the law forbidding the survivor, whether husband or wife, if owner thereof, from mortgaging generally the homestead of himself and children.⁶⁰ This he may do directly or through the agency of another.⁶¹

The interest of the survivor in the community, of course, becomes his individual property and may be sold or mortgaged, either before or after partition; but if before partition, it is not by metes and bounds, but as the estate exists, *viz.*, one in cotenancy.⁶²

§ 397. Equities between Survivor and Children.

The individual rights of the survivor and children in the com-

⁵⁵McBride v. Moore (Tex. Civ. App.) 37 S. W. 450; Wilson v. Helms, 59 Tex. 680.

⁵⁶Cage v. Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180.

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⁵⁸McBride v. Moore (Tex. Civ. App.) 37 S. W. 450.

⁵⁹Her. Prob. Guide, 691.

⁶⁰Kidwell v. Carson, 3 Tex. Civ. App. 327, 22 S. W. 534; Rice v. Scottish-American Mortg. Co. (Tex. Civ.

App.) 30 S. W. 75; Kiobassa v. Raley, 1 Tex. Civ. App. 165, 23 S. W. 253; Lacy v. Rollins, 74 Tex. 566, 12 S. W. 314; Smith v. Von Hutton, 75 Tex. 626, 13 S. W. 18; Harle v. Richards, 78 Tex. 80, 14 S. W. 257; Grothaus v. De Lopez, 57 Tex. 670.

⁶¹Dwyer v. Foley (Tex. Civ. App.) 35 S. W. 820.

⁶²Lemons v. Stratton, 5 Tex. Civ. App. 403, 24 S. W. 370; Dickerson v. Abernathy, 1 Posey Unrep. Cas. (Tex.) 107.

munity are well defined. The law fixes their several rights in the property, and neither can dispose of the other's portion. If the survivor, without a partition, disposes of a specified part, he cannot complain that equity protects the children's interests by allowing them their share out of the remainder.⁶³ This is just to the purchaser, and not prejudicial to the children, if sufficient of the estate remains in kind and quantity. It is tantamount, so far as the survivor is concerned, to a voluntary partition,⁶⁴ and binding upon those dealing with him with notice or not for value.⁶⁵ If, however, the conveyance be for the payment of community debts, the several parties retain their respective interests in the remaining property of the estate.⁶⁶ Upon the other hand, as has been intimated, where the heirs have received from the estate their just proportion of the same, it is as to them tantamount to a partition, and they cannot question the right of the survivor to make disposition of the remainder.⁶⁷ If the survivor invests the community funds in property, the property likewise becomes community, and the survivor and children tenants in common therein. This is the common doctrine of trusts.⁶⁸ But it has no application when the survivor attempts to exchange land belonging to the community for other property, for the survivor does not hold the interest of the children in such community property in trust.⁶⁹

It is further pertinent to say that upon settlement with heirs the survivor should be permitted to retain enough of the community to reimburse himself for expenditures out of his own estate made in behalf of the community. This amount should not be taken into account in the partition.⁷⁰ The survivor cannot be compelled by the heirs to discharge the community debts

⁶³Williams v. Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595; Taylor v. Barrow, 2 Posey Unrep. Cas. (Tex.) 689.

⁶⁴Peak v. Swindle, 68 Tex. 242, 4 S. W. 478; Arnold v. Cauble, 49 Tex. 527.

⁶⁵Cheek v. Herndon, 82 Tex. 146, 17 S. W. 763.

⁶⁶Bass v. Davis (Tex. Civ. App.) 38 S. W. 268.

⁶⁷Ante, § 395; Long v. Moore, 19 Tex. Civ. App. 363, 48 S. W. 43.

⁶⁸McAlister v. Farley, 39 Tex. 553.

⁶⁹Dickerson v. Abernathy, 1 Posey Unrep. Cas. (Tex.) 107.

⁷⁰Leatherwood v. Arnold, 66 Tex. 414, 1 S. W. 173; Davis v. Harmon, 9 Tex. Civ. App. 356, 29 S. W. 492.

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⁵⁹Her. Prob. Guide, 691.

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⁶²Lemons v. Stratton, 5 Tex. Civ. App. 403, 24 S. W. 370; Dickerson v. Abernathy, 1 Posey Unrep. Cas. (Tex.) 107.

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⁶³*Williams v. Emberson*, 22 Tex. Civ. App. 522, 55 S. W. 595; *Taylor v. Barrow*, 2 Posey Unrep. Cas. (Tex.) 689.

⁶⁴*Peak v. Swindle*, 68 Tex. 242, 4 S. W. 478; *Arnold v. Cauble*, 49 Tex. 527.

⁶⁵*Cheek v. Herndon*, 82 Tex. 146, 17 S. W. 763.

⁶⁶*Bass v. Davis* (Tex. Civ. App.) 38 S. W. 268.

⁶⁷*Ante*, § 395; *Long v. Moore*, 19 Tex. Civ. App. 363, 48 S. W. 43.

⁶⁸*McAlister v. Farley*, 39 Tex. 553.

⁶⁹*Dickerson v. Abernathy*, 1 Posey Unrep. Cas. (Tex.) 107.

⁷⁰*Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. 173; *Davis v. Harmon*, 9 Tex. Civ. App. 356, 29 S. W. 492.

out of his separate estate so as to leave to them the community intact. The survivor or his estate should be held to an account with his children upon the principles of equity applicable to trustees generally.⁷¹

§ 398. Suits By and Against Survivor.

The marital partnership is in many respects analogous to an ordinary commercial partnership. Upon the death of one of the partners (where there are only two), the other winds up the partnership affairs, paying the partnership debts, mortgaging or selling the partnership property, suing and being sued as the surviving partner of the former firm. So in the marital partnership. The survivor winds up the partnership affairs in much the same way. There is this distinction, however. In a commercial partnership, each partner is liable, and whichever survives may be sued as an individual, and his individual assets be reached as well as those of the former partnership; while in the marital the husband only is personally liable. Where he survives he may be sued as an individual for the community debts, and judgment taken against him without any allegation or proof that the action is for a community debt, and the judgment will authorize execution against the community estate as well as against his separate property.⁷² But an action cannot be maintained against him individually in such manner as to subject the separate property of the deceased wife in his hands to execution for her separate debts. It could only be done in an action against the administrator or other legal representative in his proper capacity.⁷³ While the wife is not personally liable, and if she survives she must be sued because she has in her possession, or has appropriated, effects which such suing creditor or claimant could rightfully subject to his demand. And the judgment, as in cases of qualified survivor, should so limit the recovery.

The surviving husband or wife, where there is no necessity for administration, may sue for the enforcement of all demands due the estate. Any cause of action in favor of the community

⁷¹Lumpkin v. Murrell, 46 Tex. 52.

⁷²Siese v. Malsch, 54 Tex. 355.

⁷³Carter v. Conner, 60 Tex. 52.

which survives the death of the husband may be thus prosecuted by the widow.⁷⁴ For, as stated in *Walker v. Abercrombie*, 61 Tex. 69: "The powers of the survivor of the community in regard to the common estate, under our system, have been recognized to be very great. Without administration she may in good faith sell the property of the estate for payment of debts, and thus destroy the title of heirs and the right of creditors longer to look to it. . . . If she can thus destroy the title of an estate in community property, she surely may preserve it through an action in her own name."

The surviving wife may continue a suit for personal injuries to her, brought by her husband during his lifetime.⁷⁵

§ 399. The Same Subject.

The survivor need not join as plaintiffs in the suit the minor children of the deceased,⁷⁶ for a judgment rendered for or against such survivor would be as binding upon those claiming through the deceased member as though such heirs were parties to the record;⁷⁷ and a sale of the community property under such a judgment carries the title to the purchaser, free from the claims of such heirs.⁷⁸ Nor is the right of the widow to thus sue restricted to those cases where her marriage to the deceased was celebrated under all the forms of the statute. It may have been good only as a common-law marriage.⁷⁹

As in cases of qualified survivors, the widow is liable only for the community debts to the extent of the assets received by her,

⁷⁴*Corsicana Cotton Oil Co. v. Valley*, 14 Tex. Civ. App. 250, 36 S. W. 999; *Pennsylvania F. Ins. Co. v. Wagley* (Tex. Civ. App.) 36 S. W. 997; *Walker v. Abercrombie*, 61 Tex. 69; *Western U. Teleg. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564; *Rev. Stat. 3353a*; *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 109, 48 S. W. 778.

⁷⁵*Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 109, 48 S. W. 778.

⁷⁶*Walker v. Abercrombie*, 61 Tex. 69; *Chambers v. Ker*, 6 Tex. Civ.

App. 373, 24 S. W. 1118; *Gulf, W. T. & P. R. Co. v. Goldman*, 87 Tex. 567, 29 S. W. 1062.

⁷⁷*Woodley v. Adams*, 55 Tex. 520; *Carter v. Conner*, 60 Tex. 60; *Western U. Teleg. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564.

⁷⁸*White v. Waco Bldg. Assn.* (Tex. Civ. App.) 31 S. W. 58; *Carleton v. Goebler* (Tex.) 58 S. W. 829.

⁷⁹*Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135.

and to this extent she may be sued by creditors without the necessity of administration.⁸⁰ If there is no allegation of a conversion of the funds of the estate, the judgment can only direct execution to issue against the common property; but if the execution is not so directed it may nevertheless be levied upon that estate;⁸¹ but where there are such allegations upon proper proof, of course the judgment is a personal one. In such case the plaintiff makes a *prima facie* case when he shows that funds sufficient of the estate to pay his debt have been appropriated; if the widow seeks to justify upon the ground that the property is exempt to her under the statute, it is a matter of affirmative defense and must be pleaded by her.⁸²

The creditor is not required to pursue the remedy here indicated, but may collect his debt through the medium of an administration, which is the ordinary method under our statutes.⁸³ And since the statute noticed in a preceding section,⁸⁴ the remedy of community creditors is very much simplified. By forcing an administration they obtain possession of the estate, or, if partitioned to the survivor, it is only upon security being given in the form of a bond which may become the basis of a suit. Resort has been had in the trial court to the appointment of a receiver of the community estate, but the appellate court expressly pretermitted a discussion of the legality of such a proceeding,⁸⁵ which is undoubtedly of very questionable propriety.

§ 400. Remarriage of Widow.

We have already seen that by express statute the power of the widow to manage and dispose of the estate as qualified survivor

⁸⁰Patterson v. Allen, 50 Tex. 23; McCampbell v. Henderson, 50 Tex. 601; Webster v. Willis, 56 Tex. 468; Mayes v. Jones, 62 Tex. 365; Schmidtke v. Miller, 71 Tex. 103, 8 S. W. 638; Low v. Felton, 84 Tex. 378, 19 S. W. 693; Buchanan v. Thompson, 4 Tex. Civ. App. 236, 23 S. W. 328; Solomon v. Skinner, 82 Tex. 345, 18 S. W. 698; Byrd v. Ellis (Tex. Civ. App.) 35 S. W. 1070.

⁸¹Hollingsworth v. Davis, 62 Tex. 438.

⁸²Ross v. O'Neil, 45 Tex. 599; Cockrum v. McCracken, 1 Tex. App. Civ. Cas. (White & W.) § 66.

⁸³Green v. Rugely, 23 Tex. 539; Ansley v. Baker, 14 Tex. 607; Cunningham v. Taylor, 20 Tex. 126; McMiller v. Butler, 20 Tex. 402.

⁸⁴*Ante*, § 391.

⁸⁵Ballard v. McMillan, 5 Tex. Civ. App. 679, 25 S. W. 327.

ceases upon her contracting a second marriage.⁸⁶ With much stronger reason it is held that, in the absence of a community administration, her powers to manage and dispose cease upon another marriage. During her widowhood she has an uninterrupted personal supervision and control of the estate, precisely the same as the husband should he survive; upon marrying again she loses this control in favor of her husband,—a stranger to the estate and its interests. She cannot then control, nor even pay community debts with it.⁸⁷ As said in *Auerbach v. Wylie*, 84 Tex. 619, 19 S. W. 856: "The powers of the surviving wife cease with her widowhood, as well with reference to the equitable as the legal title to community property. Her freedom of agency is, in the eyes of the law, so absorbed in the will of the husband, that she is deemed to be incapacitated to successfully wind up the connubial partnership she has so effectually put behind her." Nor can she then sue or be sued as representative of the estate;⁸⁸ but the estate, should the necessity exist, is open to administration.⁸⁹

⁸⁶*Ante*, § 387; Rev. Stat. art. 2237.

⁸⁷*Davis v. McCartney*, 64 Tex. 584; *Groesbeck v. Bodman*, 73 Tex. 287, 11 S. W. 322; *Auerbach v. Wylie*, 84 Tex. 619, 19 S. W. 856; dissenting opinion, 84 Tex. 620, 20 S. W. 776; *Withrow v. Adams*, 4 Tex. Civ. App. 438, 23 S. W. 437, and au-

thorities cited; *Hasseldenz v. Doffemyre* (Tex. Civ. App.) 45 S. W. 830.

⁸⁸*Llano Improv. & Furnace Co. v. Cross*, 5 Tex. Civ. App. 175, 24 S. W. 77.

⁸⁹*Her. Prob. Guide*, 466.



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INDEX.

BANDONMENT.

- of wife by husband, §§ 29, 31, 50, 105, 116, 177, 284, 292.
- does not relieve husband from supporting wife when, § 51.
- threats of, by husband, as duress, § 114.
- by husband as authorizing wife to convey community, § 116.
- of husband by wife, her community rights, § 177.
- by husband, implied gift to wife of her future earnings, § 219.
- by husband of business homestead, § 253.
- of homestead does not validate invalid mortgage, § 262.
- of homestead, judgment lien attaches, § 266.
- of intention to reinvest proceeds of insurance on homestead, § 269.
- of homestead, § 270.
- of homestead by husband in fraud of wife, § 271.
- of homestead and husband by wife, §§ 272, 374.
- of wife, her suits, §§ 284, 287, 290, 292.
- of wife, suits for alienation of husband's affections, § 291.
- of wife, suits against her, § 296.
- allegation of, by wife, § 298.
- of wife, limitations against her, § 311.
- as ground for divorce, § 335.
- defined, § 335.
- mere separation is not, § 335.
- involuntary absence is not, § 338.

See also DESERTION; DIVORCE.

BATEMENT.

- none of wife's suits instituted *dum sola*, by her marriage, § 285.
- none upon death of husband plaintiff, when, § 286.

BORTION.

- by husband upon wife, wife as witness, § 305.

BSENCE.

- of first wife; presumption, § 13.
- of husband, wife's powers discussed, § 50.
- when husband's, not permanent, §§ 105, 298.
- from homestead, § 272.
- absence of wife from husband and homestead, § 272.

ACCESSORY.

wife as husband's, § 156.

ACCOUNTING.

between husband and wife, § 203.

between community and separate estate, § 206.

ACCUMULATION.

See **EARNINGS; PROFITS.**

ACKNOWLEDGMENTS.

of transfer of wife's vendor's lien note not necessary, § 62.

unnecessary to partition of land, § 64.

to wife's contract to convey, § 74.

form prescribed in 1841, § 95.

under act of 1846, § 96.

under act of 1879; present statute, § 97.

as essential part of wife's deed, § 100.

time of making, § 101.

separate deeds, § 101.

certificate of officer should show, § 108.

who may take, § 111.

deed without, § 113.

of matrimonial agreement, § 274.

See also **PRIVY EXAMINATION.**

ACQUIESCENCE.

by wife as creating an estoppel, §§ 130, 131.

by wife in use of her property will not cure defective conveyance, §§
131, 132.

wife foreclosing for purchase money estops her, § 139.

ACQUISITIONS.

during marriage, §§ 169, 171, 184, 198, 203, 205.

presumed to be community when, § 179.

See also **COMMUNITY PROPERTY; INCREASE; SEPARATE PROPERTY OF WIFE.**

ACTIONS.

by and against wife generally, §§ 280, 283.

against wife; her liability must be alleged and proved, §§ 46, 47.

for corruption of defective certificate, § 110.

for fraud, § 147.

by parent or wife on liquor dealer's bond, § 196.

for damages to separate property, § 229.

to recover wife's property, § 282.

to collect her debts, § 282.

to restrain sale of wife's property, §§ 233, 282.

for divorce, § 283.

concerning community property generally, § 287.

by parent for death of child, parties, § 288.

ACTIONS—continued.

- on liquor dealer's bond, parties, § 289.
- concerning the homestead, parties, § 290.
- for alienating husband's affections, § 291.
- limitations, §§ 308-314.

ADJUSTING EQUITIES.

- sale of homestead by husband, §§ 117, 259, 265.

ADMINISTRATION.

- of community in cases of insanity, § 104.
- generally, estate, § 366.
- not granted unless, § 366.
- order of preferences in granting letters, § 366.
- survivor may renounce right to, § 366.
- revoking letters in favor of one having preference, § 366.
- allowance for support of widow and minor children, statute, § 367.
- the order for year's allowance, § 368.
- who entitled to the year's support, § 369.
- taking property in payment of year's allowance, § 370.
- setting apart exemptions and allowances in lieu, statute, §§ 371, 372.
- nature and extent of rights of widow and children, §§ 372, 381.
- whether by executor or administrator, rights of survivor and children same, § 372.
- exemptions and allowances no part of the estate for, §§ 372, 380, 381.
- of community, see ADMINISTRATION OF COMMUNITY.
- joint administrations, § 386.
- partition of community from separate estates, §§ 388, 391, 399.
- creditor may force, § 399.
- receiver of community estate, § 399.
- estate open to, upon remarriage of widow, § 400.

ADMINISTRATION OF COMMUNITY.

- estate liable for community debts, §§ 375, 381, 388, 389, 392.
- not required when, §§ 375, 388.
- where wife insane, § 375.
- when, §§ 104, 375.
- applications for, § 375.
- appointment of appraisers, § 375.
- returning inventory and lists, §§ 375, 385.
- bond, §§ 375, 376, 378, 385, 388.
- order of judge, §§ 375, 378, 385.
- rights and power of survivor, §§ 375, 376, 378.
- account of survivor with estate, §§ 375, 378.
- new appraisement and bond, when, §§ 375, 378, 385.
- payment of debts, §§ 375, 377.
- creditor compelling exhibit, §§ 375, 383.
- closing the administration, §§ 375, 387.

ADMINISTRATION OF COMMUNITY—continued.

- citation to survivor on debt, when, §§ 375, 383.
- suits on bond, §§ 375, 376, 383, 384.
- where wife survives, § 375.
- remarriage of widow, §§ 375, 387, 400.
- partition when, § 375.
- nature of survivor's holding, § 376.
- court no control of estate after, §§ 376, 383.
- claims against estate, §§ 376, 377, 383.
- law of, not retrospective, § 376.
- sales by survivor, §§ 378, 381, 384, 387.
- mortgage by survivor, §§ 378, 381.
- exemptions, § 379.
- what are "assets" of estate, §§ 380, 381.
- sales by survivor of homestead, §§ 381, 384.
- liens upon estate generally, § 382.
- suits by and against survivor, §§ 383, 384.
- defective and irregular proceedings, § 385.
- joint administration, § 386.
- closing up, § 387.
- profits and gains from use of estate, §§ 375, 387.
- recovery of sanity of spouse, § 387.
- death of wife pending community administration of husband, § 387.
- receiver of community estate, § 399.

ADMINISTRATOR.

- no power over exempted property, or allowances, § 373.
- comparative rights of, and survivor, §§ 390, 391.

See also ADMINISTRATION.

ADULTERY.

- amongst slaves, § 5.
- of husband, wife as witness, § 305.
- as ground for divorce, § 336.

ADVERSE POSSESSION.

- between husband and wife, limitations, § 314.

AGE.

- males under sixteen, § 4.
- females under fourteen, § 4.
- contractual age in women, § 6.
- female of full age after marriage, § 18.

AGENCY.

- between husband and wife discussed, §§ 35, 49, 67, 280.
- how shown, §§ 50, 67.
- revocation of, §§ 35, 120.
- of husband to sue for wife, when, § 286.

GENT.

- married women as, § 32.
 - husband as wife's, §§ 35, 40, 42, 49.
 - tort of wife's, § 154.
 - husband as wife's to conduct her litigation, §§ 280, 281.
- See also REPRESENTATIVE CAPACITIES.

AGREEMENT.

- of infant to marry, § 3.
- to marry by one already married, § 3.
- between husband and wife cannot change status of their property, §§ 144, 172, 218.
- of husband in wife's suits, §§ 37, 280.

ALIENATING HUSBAND'S AFFECTIONS.

- suit for, § 291.

ALIMONY.

- reason for allowance, § 357.
 - duration of allowance, § 357.
 - when allowed, § 357.
 - application for, § 357.
 - no "suit for," § 357.
 - effect of order for, § 357.
 - to wife only, § 357.
 - enforcing, § 357.
 - whether considered in accounting, § 357.
- See also DIVORCE.

ALLOWANCE.

- by county court from wife's lands for her support, § 226.
- to widow and minor children, statute, § 367.
- for support of widow, etc., fixed when, § 367.
- is for first year and cannot exceed \$1,000, §§ 367, 369.
- when beneficiary has income, §§ 367, 369, 379.
- order for, §§ 367, 368.
- paid to whom, §§ 367, 369.
- right to take property in payment, §§ 367, 370, 372.
- sale to make up, § 367.
- a preferential claim, § 367.
- how paid, § 367.
- application for, § 368.
- order for, has force of judgment, § 368.
- creditors cannot prevent, § 368.
- wife of common-law marriage, § 369.
- to children, and not to widow, when, § 369.

ALLOWANCE IN LIEU OF EXEMPTIONS.

- in lieu of homestead exempt from partition, when, § 365.
 - where exempted property does not exist in kind, §§ 371, 373.
 - to whom paid, §§ 371, 372, 381.
- M. W.—32.**

ALLOWANCE IN LIEU OF EXEMPTIONS—continued.

- amount of in lieu of homestead, §§ 371, 372.
- amount of in lieu of other exemptions, §§ 371, 372.
- paid in money and property of estate, §§ 371, 372.
- how paid, § 371.
- sale to make up, § 371.
- property encumbered with liens, §§ 371, 373, 382.
- where estate solvent, § 371.
- where estate insolvent, §§ 371-373, 380, 382.
- never to husband, § 372.
- to children only upon death of father, § 372.
- creditors cannot defeat, §§ 372, 379.
- effect of order, §§ 372, 379.
- beneficiaries having income immaterial, § 372.
- right to, a preferential claim, § 372.
- right to, not defeated by administrators, § 372.
- comes from deceased's estate, §§ 372, 379, 381.
- whether widow may sell interest of children in, § 372.
- none in lieu of homestead where survivor owns one §§ 373, 381.
- who are beneficiaries of statute, § 374.
- to grandchild, § 374.
- to "unmarried daughters," § 374.
- power of district court to make, § 374.
- in community property, § 379.
- sales of, by survivor, §§ 372, 380, 381.

ANNUITY.

- payable to wife, § 225.

See also TRUSTS.

ANSWER.

- See PLEADINGS; DIVORCE.

ANTENUPTIAL.

- mutual obligations, § 49.
- debts of wife, §§ 50, 203.
- debts of wife, liability of her estate, §§ 59, 293.
- debts of spouses, liability of community, § 203.
- contracts between husband and wife, §§ 274-277.
- incontinence of wife, § 331.

APPEAL.

- by husband alone when, § 286.

ASSAULT.

- wife may be sued for, § 154.
- committed by wife upon husband, § 156.
- by husband upon wife, wife as witness, § 305.
- as ground for divorce, § 333.

SENT.

- of husband to wife's acts as agent or trustee, § 32.
 - of husband not necessary to wife's contracts, when, §§ 45, 49.
 - to wife's alienation of her paraphernalia, § 94.
 - wife need not, to husband's mortgage of the community, § 207.
- See also CONSENT.

TTACHMENT.

- by wife, § 76.
- against husband by wife, § 283.

TORNEY.

- wife may employ, §§ 66, 280.
- wife bound by act of her, when, § 322.

TORNEYS' FEES.

- when a lien against homestead, § 264.
- in divorce, §§ 66, 358.

UTHORITY.

- See AGENCY AND AGENT; SURVIVOR.

VOIDING CONVEYANCES.

- generally, § 113.

WAIL.

- Wife's bond, §§ 76, 156.

WANK DEPOSITS.

- in wife's name, § 92.

WANKRUPTCY.

- wife may file petition in, § 282.

WATING WIFE.

- § 30.

WIGAMY.

- statute, § 4.
- of husband, wife as witness, §§ 305, 306.
- ground of annulment of marriage, § 330.

WBOARDING HOUSE.

- earnings of wife's, community, § 186.

WONA FIDE PURCHASERS.

- of community from husband, § 149.
- from holder of legal title, § 175.
- wife as. from husband, § 223.
- of wife's property standing in husband's name, § 233.
- wife's resulting trusts, § 239.

BONA FIDE PURCHASERS—continued. •

- notice of wife's equities by recitals in deed, §§ 240, 241.
- record of marriage contract, §§ 274, 275.
- from survivor, § 395.
- equities on partition, § 395.

BONDAGE.

- as affecting capacity to marry, § 3.

BOND, MARRIAGE.

- § 8.

BONDS.

- for title, § 74.
- generally, §§ 76, 156.
- in course of her litigation, § 76.
- for title must be joined by husband, etc., §§ 101, 121.
- bail, § 156.
- for title to homestead, §§ 122, 261, 394.
- of administrator's and survivor's, suit, §§ 375, 376, 383, 384.
- See also LIQUOR DEALER; SURETY.

BORROWED MONEY.

- by wife, §§ 143, 184, 228.
- for improvements on homestead, mortgage, §§ 263, 264.

BREACH OF PROMISE.

- to marry, damages, §§ 277, 291.
- where one complying is infant, § 3.

BRICKS.

- made from wife's land, community, § 189.
- not "increase of lands," § 221.

BUGGY OR CARRIAGE.

- one exempt, § 273.

BUILDINGS.

- on wife's separate land, § 60.
- placed on wife's land from common funds, § 205.
- erection of, as evidence of intention to dedicate homestead, § 247.

BURDEN OF PROOF.

- to trace separate property, §§ 145, 146, 223, 231, 232.
- to overcome presumption of community, §§ 182, 232, 326.
- to show acquisition community, when, §§ 182, 232.
- to show estate entitled to reimbursements, § 206.
- to show resulting trust, § 242.
- to show abandonment of homestead, § 270.
- to show intention to return to homestead, § 270.

BURDEN OF PROOF—continued.

- upon validity of inequitable marriage contract, § 277.
- to show coverture in reply to limitations, § 311.
- to show authority for survivor's sale, § 393.
- to show fraud or notice of equities, § 395.

BUSINESS.

- wife's, husband's right to manage, § 40.

BUSINESS HOMESTEAD.

- discussed, § 253.
- conveyance of, § 117.
- protected as the residence, § 244.
- must be urban, §§ 249, 253.
- detached lots, § 253.
- value, § 253.
- estate to support, § 253.
- wife's rights in, § 253.
- cannot be mortgaged, §§ 253, 262.
- husband may abandon, §§ 253, 270.
- things affixed to realty, § 254.

See also HOMESTEAD.

CAPACITY OF MARRIED WOMEN.

- under Spanish law, § 22.
- at common law, §§ 21, 153.
- with us, §§ 25, 83, 99.
- representative, § 32.
- to contract discussed, §§ 45, 46.
- to purchase on credit, §§ 69, 70, 142, 192, 216, 218, 228.
- to dispose of their property generally, §§ 98, 99.
- all persons charged with the limitations upon, § 131.
- to own an estate generally, § 210.
- to sue and be sued, §§ 280, 281.

See also WIFE'S POWERS.

CARRIAGE OR BUGGY.

- exempt, § 273.

CASE.

See ACTIONS; SUITS.

CAUSES OF ACTION.

- wife may release her, § 63.
- wife may compromise, § 280.
- wife's may be joined with husband's, and he recover on both, § 286.

See also ACTIONS; SUITS.

CERTIFICATE OF ACKNOWLEDGMENT.

- form prescribed in act of 1841, § 95.

CERTIFICATE OF ACKNOWLEDGMENT—continued.

form prescribed in act of 1846, § 96.

form of act 1879, § 97.

present statute, § 97.

“substantial compliance,” § 98.

an essential part of wife's deed, § 100.

one need not embrace both husband's and wife's acknowledgment, § 101.

where wife has really never appeared before officer, § 107.

essential features of, discussed, §§ 108, 110.

substantial compliance; instances, § 108.

seal, § 109.

defective, correction, § 110.

absolute verity accorded, §§ 112, 113.

CHANGE.

of name, §§ 17, 352.

CHARGES.

husband's inability to create against wife's property, §§ 37, 59.

for expenses of administration, §§ 389, 397.

of unchastity against wife, 334.

CHASTISEMENT.

of wife by husband, § 30.

CHILD.

legitimacy of, § 11.

when birth of, revokes will, § 163.

action by parent for damages for death of, § 288.

award of custody, upon divorce, §§ 359, 360.

CHILDREN.

of slave marriages, § 5.

of invalid marriages, § 16.

of common-law marriages, § 19.

support of, § 29.

right of father to control, §§ 30, 274.

legitimacy, by what law governed, § 34.

guardianship of, by married woman, § 165.

born before marriage, inherit when, § 364.

CHOSES IN ACTION.

separate estate may include, §§ 215, 224, 225, 325.

wife's, at common law, § 291.

defined, § 325.

CITATION.

service of on husband not notice to wife, § 293.

service of on married women generally, § 293.

CITATION—continued.

by publication to husband, § 296.
in divorce case, § 342.

CITIZENSHIP.

of wife, § 28.

CIVIL LAW.

relation of husband to wife's dower and paraphernalia, etc., § 38.
donations, § 79.
of property rights, § 168.

CIVIL WRONGS.

See TORTS.

CLERICAL ERRORS.

in certificate of acknowledgment, § 108.

CLOTHING.

a necessary, § 54.

CODICILS.

See WILLS.

COERCION.

wife's torts supposed to be committed by husband's procurement, § 153.
See also DURESS.

COHABITATION.

evidence of marriage, § 12.
as ratification of void marriage, § 15.

COLONIAL GRANTS.

to families are community, § 198.

COMITY.

discussed, § 34.
marital relations, § 339.

COMMON LAW.

its introduction, §§ 23, 24, 169.
age as affecting right to marry, § 6.
marriage, §§ 12, 19.
relation of husband and wife, § 21.
effect of, on our marital rights laws, §§ 25, 291.
of conveyances, § 94.
estoppel of married women, § 126.
wife's wills at, § 157.
separate estate of wife unknown at, §§ 210, 215.
wife's suits, §§ 153, 291.
husband and wife as witnesses, § 302.
widow's suits, § 399.

COMMUNITY.

begins at marriage with nothing. § 184.

is terminated by death or divorce, §§ 177, 201, 324.

COMMUNITY DEBT.

liability of community property, § 202.

what is, § 202.

COMMUNITY PROPERTY.

primary fund for support of wife. § 29.

descent where spouse insane, §§ 31, 104, 375.

gifts and conveyances between spouses of, § 80.

conveyance of where husband insane, §§ 103, 104.

conveyance of, wife need not join generally, §§ 115, 175, 176.

conveyance of by wife when, § 116.

under exclusive control of husband generally, §§ 116, 147, 169, 171, 175, 176, 207, 202.

husband's conveyance of, where legal title in wife, §§ 116, 175, 207.

husband may bind, by estoppel, § 135.

wife's purchases on credit, §§ 140, 142, 192.

crops grown on wife's land, §§ 143, 187.

borrowed money, §§ 143, 184, 228.

profits from wife's investments, §§ 144, 190.

presumptions of, §§ 146, 179-181, 183, 201, 232, 326, 395.

sale of by husband in fraud of wife, §§ 147-149, 168, 207.

bona fide purchases of, § 149.

wife's will, § 159.

devise of, presumption, § 160.

husband's will, § 160.

defined, Spanish law, § 168.

defined by act 1840, § 169.

defined by act of 1848, present statute, § 170.

nature of wife's interest in, §§ 171, 174.

wife cannot alien her interest in, § 174.

wife's title in, whether legal or equitable, § 175.

extent of wife's interest in, § 176.

liable for debts of husband and wife, §§ 176, 317.

"living apart," wife's rights in, §§ 177, 184.

meretricious unions, § 178.

illicit relations, § 178.

burden of proof to show, when, § 182.

insufficient proof to overcome presumption of, illustrations, § 183.

includes what, §§ 184, 203.

death or divorce of parties, presumptions, §§ 184, 326, 354.

increase of wife's property, § 185.

wife's personal earnings are, § 186.

rent of wife's property is, §§ 188, 220.

timber, soil, etc., taken from wife's land, § 189.

COMMUNITY PROPERTY—continued.

- interest on wife's money, § 191.
- damages for injury to person of either spouse, §§ 193, 287.
- damages to, § 194.
- husband's life insurance when, § 195.
- statutory penalty when, §§ 196, 289.
- property acquired by limitations, § 197.
- colonial grants to families, § 198.
- pre-emption homesteads, § 199.
- bounty warrants and land certificates, § 200.
- changes and mutation of, § 201.
- liability of, for community debts, §§ 202, 317.
- liability of, for antenuptial debts of spouses, § 203.
- liable for individual debts contracted during marriage, §§ 204, 317, 323.
- fund for payment of debts generally, §§ 204, 296.
- held in cotenancy, when, § 204.
- entitled to reimbursement, when, §§ 205, 228.
- must reimburse separate estates when, § 206.
- property acquired in another state, status, § 208.
- owned by nonresidents, § 208.
- presumption of, when wife's schedule registered, § 212.
- as affected by marriage contract, §§ 274, 275.
- status cannot be altered by mere agreement, §§ 144, 172, 218, 278.
- wife may sue and foreclose lien on when, § 283.
- wife may sue for when, § 284.
- suits for damages to exempt, parties, § 286.
- actions concerning generally, §§ 287, 297.
- actions by wife concerning, when, §§ 287, 292, 298.
- whether recovery by parent for death of child is, § 288.
- actions to recover damages for injuries resulting in death of child, parties, § 288.
- actions against railway company for penalty, parties, § 289.
- whether damages for alienating husband's affections are, § 291.
- control of where husband insane, § 292.
- wife's suits for, allegations of capacity to sue, § 298.
- limitation concerning, binds wife when, § 310.
- rights of divorced parties in, §§ 324, 354.
- conveyances pending divorce, § 340.
- allegations concerning, in divorce proceedings, § 341.
- descent of, § 364.
- homestead of survivor in, §§ 365, 371.

See also SURVIVOR.

COMPENSATION.

- husband not entitled to, for caring for wife's property, §§ 205, 234.
- wife not entitled to, for household work, § 186.

See also PROFITS.

COMPETENCY.

See WITNESS.

COMPROMISE.

- wife may make, §§ 63, 280, 322.
- of community suit by husband, § 287.

CONFIDENTIAL COMMUNICATIONS.

- between husband and wife privileged, § 303.
- what are, § 303.
- another hearing may disclose, § 303.

CONFLICT OF LAWS.

- as to validity of marriage, § 11.
 - as to place of marriage, §§ 27, 362.
 - laws of matrimonial domicil, § 27.
 - intended domicil, §§ 27, 34, 272, 279.
 - discussed generally, § 34.
 - as to property rights, §§ 208, 235.
 - as to wife's capacities, § 235.
 - as to marriage settlement, § 279.
 - causes for divorce, § 339.
 - decrees of divorce of foreign state, § 362.
- See also LAW; PROPERTY.

CONSENT.

- to marriage, §§ 2, 3, 6.
 - of husband at Spanish law, §§ 22, 44.
 - of parent, §§ 6, 7.
 - of wife to husband's act when, and when not, necessary, § 35.
 - of husband to wife's sale, §§ 37, 79, 118.
 - will not excuse joining in wife's deed, § 101.
 - of husband is question of fact, § 116.
 - of husband to wife's will, § 159.
 - of wife to sale of homestead, § 258.
 - of husband to wife's suits not required, § 282.
 - of wife to husband's sale of exempt personalty not required, §§ 273, 290
- See also ASSENT.

CONSIDERATION.

- wife's returning, where she rescinds, § 72.
- grossly inadequate, as notice, § 114.
- use of wife's property as, for husband's promise to pay, § 218.

CONSTITUTIONAL PROVISIONS.

- slave marriages, § 5.
- introducing common law, § 23.
- defining marital rights, § 23.
- limitations, § 23.
- qualifications of officers, § 33.
- descent of homestead, § 159.
- defining separate property of wife, § 209.
- exempting and defining homestead, § 243.

CONSTITUTIONAL PROVISIONS—continued.

- liens on homestead, § 243.
- all courts open to every person, § 280.
- exemptions of married women from statute of limitations, § 308.
- descent of homestead, § 365.
- partition of homestead, § 365.

CONSTRUCTION.

- of wills, § 160.
- of marriage settlements, § 276.

CONTIGUOUS TRACTS.

- homestead, §§ 249, 253.

CONTRACTS OF MARRIED WOMEN.

- See WIFE'S CONTRACTS.

CONTRIBUTION.

- between husband and wife for wife's torts, § 153.

CONTROL.

- of property when husband absent, §§ 31, 105.
 - wife's property under husband's, §§ 36, 37, 58, 82, 205, 210.
 - of wife's property where husband insane, § 103.
 - of community by husband, §§ 116, 147, 169, 171, 175, 176, 207, 292.
 - husband's, of wife's property defeated by conveyance in trust, § 225.
- See also MANAGEMENT; USE.

CONVERSION.

- by husband of wife's property, § 38.
- wife may be sued for, § 154.
- of wife's property, husband may sue, § 286.

CONVEYANCE, WIFE'S.

- wife's power of attorney to husband, § 41.
- contract to convey, § 74.
- under early laws, § 94.
- mode prescribed in 1841, § 95.
- mode of, under act 1846, § 96.
- mode prescribed under act of 1879, present statute, § 97.
- without husband's joinder, § 101.
- "conveyance" defined, § 101.
- includes what, §§ 101, 159.
- when husband insane, §§ 103, 104, 116.
- husband deserted her, § 105.
- of community property, §§ 104, 105, 116.
- the privy examination, § 107.
- the officer's certificate, § 108.
- of her separate property, § 115.
- of husband's separate property, § 115.

CONVEYANCE, WIFE'S—continued.

- of community where husband insane or a minor, § 116.
 - of the homestead, §§ 105, 117, 258.
 - of her personal property, § 118.
 - bonds for title, §§ 121, 122.
 - title bonds for homestead discussed, §§ 122, 123, 261.
 - mechanics' and other liens for improvements, §§ 124, 264.
 - effect of, on after-acquired title, § 125.
 - will is not a "conveyance," within statute, § 159.
 - mortgage on homestead, § 262.
 - contracts for improvements on homestead to be executed as, § 264.
- See also DEEDS.

CORPORATOR.

- wife as, § 77.

COSTS.

- See DIVORCE; SUITS.

COVERTURE.

- disabilities of, discussed, §§ 43, 128.
- of defendant appearing in pleading, § 300.
- must be pleaded as a defense, § 301.

CREDIT.

- wife's buying on, §§ 69-71, 142, 192, 216, 218, 228.

CREDITORS.

- generally, discussed, § 93.
- wife as creditor of husband, §§ 88, 145, 283.
- cannot complain at husband paying his wife, when, § 90.
- no concern with exempt property, § 93.
- cannot, by wrongfully seizing wife's property, appropriate its community revenues, § 191.
- cannot defeat wife's right to convey her property, § 225.
- of husband, wife's resulting trusts, § 239.
- have no concern with money invested in homestead, § 251.
- are affected by record of marriage contract, § 275.

CRIMES.

- of married women, § 156.
- intermarriage of whites and blacks, § 4.
- bigamy, § 4.
- officer illegally celebrating rites of matrimony, § 10.
- wife's bail, §§ 76, 156.
- wife's "disposing of mortgaged property," § 156.

CROPS.

- upon wife's land, § 143.
- are community, §§ 185, 187.

CROPS—continued.

- whether "increase of land," §§ 187, 221.
- on wife's land are separate when, § 226.
- as part of homestead, §§ 254, 255.

CRUELTY.

- authorizing wife's absence, § 29.
- as grounds for divorce, §§ 333, 334.

CURRENT WAGES.

- exempt, § 273.

CUSTODY.

- husband's, of wife's property discussed, § 38.
- of children upon divorce of parents, §§ 324, 352, 359.

DAMAGES.

- for injury to person of either spouse, community, §§ 193, 287.
- for tort of husband and another against wife, not community, § 193.
- to community property, § 194.
- on liquor dealer's bond, § 196.
- railroad company's refusing to redeem tickets, § 196.
- to wife's separate property, § 229.
- to homestead, §§ 255, 269.
- husband may sue for, to wife's property, § 286.
- for seizure of exempt property, parties, §§ 286, 290.
- notice of, by wife, § 287.
- for death of child, § 288.
- action on liquor dealer's bond, parties, § 289.
- for alienating husband's affections, § 291.

DEALINGS.

- between husband and wife, presumptions, § 147.

DEATH.

- of party to marriage agreement, § 2.
- presumption of, § 13.
- of wife, effect on authority of her agent, §§ 35, 120.
- as a punishment for wife's crime, § 156.
- terminates marriage relation and community, §§ 177, 324.
- of husband, effect on wife's trusts, § 238.
- of husband plaintiff, §§ 286, 398.
- injuries resulting in, of child, action for, § 288.
- of husband or wife does not license confidential communications, § 303.
- of husband or wife, descent of property, § 363.
- of adopted heir, descent of property, § 363.
- of wife pending administration, § 387.

See also DESCENT; DISSOLUTION OF MARRIAGE; DIVORCE.

DEBTS.

- sane spouse may pay from community, § 104.
 - community liability of community property, § 202.
 - community liable for antenuptial, of spouses, § 203.
 - of individuals contracted during marriage, § 204.
 - wife may sue to recover her, when, § 282.
 - against estates of decedent, see ESTATES OF DECEDENTS.
- See also CHOSSES IN ACTION.

DECLARATIONS.

- of relative as evidence of marriage, § 12.
- of husband with respect to gifts and conveyances to wife, § 85.
- of wife as creating estoppel, § 133.
- of husband as estoppel against wife, §§ 134, 307.
- alone cannot amount to abandonment of homestead, § 270.
- of wife, evidence when, § 307.
- of husband, § 307.

DEDICATION.

- of wife's property to public use, § 78.
- of homestead discussed, § 247.

DEEDS.

- wife cannot ratify her defective, § 42.
- for certain corporation purposes, §§ 77, 106.
- of husband to wife, §§ 81, 82, 85.
- husband to wife, delivery, § 82.
- husband to wife need not limit to her "sole and separate use," §§ 82, 85.
- that, are mortgages may be shown, § 85.
- of wife to husband, § 87.
- of separation, § 91.
- their form, § 100.
- joinder of husband, § 101.
- the privy examination, § 107.
- of wife not signed, § 113.
- wife's signing when she is not a grantor, § 119.
- construction, deed or will, § 163.
- taken in wife's name, presumption, §§ 180, 181.
- failure to record wife's, does not affect her title, § 213.
- recitals in, as giving notice of wife's equities, § 240.

See also CONVEYANCES.

DEEDS OF TRUST.

See MORTGAGE.

DEFAULT JUDGMENTS.

- against wife, § 318.

DEFECTIVE ACKNOWLEDGMENTS.

- instances, § 108.

DEFECTIVE ACKNOWLEDGMENTS—continued.

equity will not aid, §§ 107, 108.
no seal, § 109.
correcting, §§ 109, 110.
rights of innocent purchasers, § 112.

DEFECTIVE DEEDS.

equity will not aid wife's, §§ 107, 108, 131, 132, 136.
no seal, § 109.
generally, § 112.
registration of, as notice, § 112.
as "title or color of title," § 112.
as an estoppel, § 136.
not good as a contract to convey, § 136.
wife foreclosing for purchase money, § 139.
of homestead, § 250.

DEFENSES.

See DIVORCE.

DEFINITIONS.

abandonment, § 335.
children, § 160.
chooses in action, § 325.
claimed, § 215.
common property, §§ 168-170, 184.
community debt, § 202.
conveyance, § 101.
cruelty, §§ 333, 334.
equitable estoppel, § 127.
ganancial property, § 184.
homestead, §§ 243, 244.
impotency, § 330.
increase of lands, § 221.
increase of property, §§ 185, 221.
my children, § 160.
necessaries, § 54.
our children in will, § 160.
outrages, § 333.
probate homestead, § 159.
separate property, § 209.
survivor, § 375.
trust, § 236.
void and voidable judgments, § 319.

DELIVERY.

of husband's deed to wife, § 82.
of wife's property to husband, § 82.
unauthorized, by husband of wife's deed no estoppel, § 134.

DESCENT AND DISTRIBUTION.

- of community where husband or wife insane. §§ 31, 375, 388.
- of separate property. § 363.
- under Spanish law. § 365.
- where deceased leaves no children. § 362.
- where children also survive. § 363.
- of community property. §§ 364, 369, 392.
- no distinction between community personality and reality. § 364.
- if wife - community will not dissolve a partnership of husband and another when. § 364.
- of homestead. § 365.

DESEDITION.

- wife - refusal to remove to husband's domicile. § 28.
- See also ABANDONMENT.

DESIGNATING HOMESTEAD.

- article. § 257, 262.

DETACHED TRACTS.

- See SEPARATE TRACTS.

DEVISEES.

- rights of. discussed. § 259.
- rights of homestead. § 259.

DEVISE IN DESCENT.

- property acquired by separate. §§ 259, 264, 269.
- devise of sales, when, of such separate. § 269.
- devise of property acquired by. § 263.

DISSOLUTION OF MARRIAGE.

- state limitations. § 210.
- new separation - not. § 224.
- separates community. §§ 211, 224.
- separates status of parties. § 224.
- effect on death of either. § 224.
- effect on pending suits. § 225.
- provisions as to property. §§ 224, 226, 224, 226.

DIWANE.

- relation of diwan to diwan. § 227.
- property, the diwan of diwan. §§ 30, 227.
- diwan of diwan. §§ 227, 224.
- diwan of diwan of diwan of diwan without intervention of next. § 227.
- diwan of diwan of diwan of diwan of diwan. § 227.
- diwan of diwan of diwan. § 227.
- Spain. § 227.

FORCE—continued.

- grounds for, generally, § 320.
- impediments rendering marriage void, §§ 329, 330.
- impotency, § 330.
- incestuous marriage, § 330.
- intermarriage between whites and blacks, § 330.
- bigamous marriages, § 330.
- insanity, § 330.
- party of immature years, § 330.
- fraud, §§ 15, 330, 332.
- wife *enceinte* at marriage, § 331.
- antenuptial incontinence of wife, § 331.
- false affidavit for license, § 332.
- substituting another for the intended husband or wife, § 332.
- marriage to escape punishment for violation of seduction law, § 332.
- cruelty, excesses, and outrages, §§ 30, 333.
- communication of venereal disease, § 333.
- cruelty and outrages affecting the mind only, § 334.
- false charges, slander, and mental injuries, § 334.
- charging wife with unchastity, § 334.
- murder by husband of wife's child, § 334.
- threats to murder wife, § 334.
- charges of unchastity against husband, § 334.
- quarreling, § 334.
- incompatibility of tempers, § 334.
- failure to support, § 334.
- failure to supply medicine and a physician as cruelty, § 334.
- abandonment as ground, § 335.
- intention to abandon, § 335.
- separation by consent not abandonment, § 335.
- abandonment must be for three years, § 335.
- offer to return to conjugal society, § 335.
- abandonment justified, § 335.
- involuntary absence not abandonment, § 335.
- adultery, § 336.
- of husband and wife contrasted, § 336.
- recrimination in adultery, §§ 336, 345.
- imprisonment for felony as ground, § 337.
- not granted within a year, § 337.
- not granted after pardon of convict, § 337.
- not granted for imprisonment when, § 337.
- drunkenness as ground, § 338.
- insanity as ground, § 338.
- opium eating as ground, § 338.
- religious belief, etc., as ground, § 338.
- causes arising outside of state, § 339.
- conveyances *pendente lite*, § 340.
- pending, wife may require inventory and injunction, § 340.
- M. W. — 33.

DIVORCE—continued.

- court may make orders respecting parties and property, § 340.
- the petition, § 341.
- petition must show venue, § 341.
- allegations of residence, § 341.
- allegations of marriage, § 341.
- allegations of grounds for, § 341.
- allegations of cruelty, outrages, etc., § 341.
- allegations of abandonment, § 341.
- allegations of adultery, § 341.
- allegations of incarceration in penitentiary, § 341.
- allegations of impediment to contract, § 341.
- allegations concerning property, § 341.
- the citation, § 342.
- citation by publication, § 342.
- citation to nonresident by notice, § 342.
- the answer, § 343.
- petition not taken as confessed for want of answer, § 343.
- plaintiff must make full proof, §§ 343, 352.
- extent of defendant's right to introduce testimony without answer, § 343.
- presumptions, § 344.
- charges by husband against wife. presumed untrue, § 344.
- presumption of paternity of child, § 344.
- presumption alone will not establish marriage, § 344.
- presumption of divorce when, § 344.
- recrimination, § 345.
- must arise out of acts of plaintiff. shown as ground, § 345.
- misconduct of plaintiff must be of same general character of defendant's, § 345.
- plaintiff need not be wholly blameless, § 345.
- slight degrees of difference in plaintiff's and defendant's guilt, § 345.
- condonation, § 346.
- revival by new acts, § 346.
- condonation in adultery cases, § 346.
- rule of condonation less stringent when applied to wife, § 346.
- quantum of proof required, § 347.
- residence of plaintiff for prescribed time must be proved, § 347.
- marriage must be proved, § 347.
- marriage may be shown by circumstances, § 347.
- admissions in defendant's answer, §§ 347, 352.
- proof must satisfy court as well as jury, § 347.
- trial court's action subject to review, § 347.
- sufficient proof. illustrations, § 348.
- parties as witnesses, § 349.
- collusion between parties, §§ 349, 350.
- admissions of parties, § 349.
- agreements not necessarily collusion, § 350.

DIVORCE—continued.

- testimony of *particeps criminis*, § 351.
- the decree generally, § 352.
- a mensa et thoro*, § 352.
- children not made illegitimate by, § 352.
- either party to, may marry again, § 352.
- court may change name of either party, § 352.
- decree need not adjust property rights, custody of children, etc., §§ 352, 354, 361.
- suits dismissed if proof insufficient when, § 352.
- decree should settle property rights, § 353.
- court's power extends to what property, §§ 353, 361.
- division of community generally, §§ 353, 354.
- disposition of separate property generally, § 353.
- debts, §§ 353, 354.
- placing property in hands of trustee, § 353.
- discretion of court in disposition of property, §§ 353, 354.
- accounting between parties, §§ 354, 357.
- rights of parties in property where not determined in divorce proceedings, § 354.
- presumption as to property upon, § 354.
- homestead, § 355.
- court may partition homestead, § 355.
- court may set apart homestead to one of the parties, § 355.
- parties become tenants in common in community homestead when, § 355.
- divesting title to real estate, § 356.
- ordering sale of separate real estate, § 356.
- may order sale of community real estate, § 356.
- setting apart separate real estate is not "divesting title," § 356.
- sale of community homestead not a divesting of title, § 356.
- alimony, § 357; See also ALIMONY.
- costs, statute, § 358.
- prevailing party entitled to costs, § 358.
- discretion of courts as to costs, § 358.
- costs may be adjudged a lien, § 358.
- wife's attorney fees not costs, § 358.
- custody of children, §§ 359, 364, 362.
- statute of custody of children, § 359.
- placing child with third person, § 359.
- good of child primary consideration, § 359.
- setting apart property to support child, § 359.
- manner of making allowance for support of child, § 359.
- enforcement of allowance for support of child, § 359.
- conclusiveness of award of children, § 360.
- finality of divorce decree generally, § 361.
- decree without service on defendant, § 361.
- erroneous decree reversed, void *ab initio*, § 361.
- when decree affects property, § 361.

DIVORCE—continued.

- decree set aside as other judgments. § 361.
- conflict of laws. § 362.
- extraterritorial force of judgment. § 362.
- decree where court has no jurisdiction. § 362.

DIVORCED WIFE.

- cannot charge husband. § 324.
- cannot sue former husband for tort, §§ 155, 283, 325.
- cannot bind husband by her contracts. §§ 50, 324.
- suits by, concerning community. § 287.
- may testify against former husband when, §§ 305, 324.

DOMICIL.

- of wife discussed. §§ 28, 34, 272.
- of wife at Spanish law. § 22.
- right to select. §§ 256, 271, 272.
- intended. §§ 27, 34, 272.

DONATION.

- rule with respect to, between husband and wife at Spanish law. § 79.
- by state to families as community. § 196.
- of homestead by government. § 190.
- by government to husband. § 200.

See ALSO GIFTS AND CONVEYANCES BETWEEN HUSBAND AND WIFE.

DURESS.

- as voiding marriage. § 15.
- of husband. § 48.
- as voiding conveyance. § 114.

See ALSO FRAUD.

EARNINGS.

- during marriage and community. §§ 184, 303.
- wife's during marriage and community. § 196.
- husband may give wife's to her when, §§ 186, 219.
- gift of future, by husband to wife. § 218.
- of parties after divorce. § 324.

See ALSO INCREASED PROFITS EXEMPTION.

ESSENTIAL.

- husband cannot give or receive wife's and. § 37.
- across homestead. § 200.

ELECTION.

- of wife under will. § 102.
- by wife as to support. § 137.

EMPLOYMENT.

- of husband as wife's agent. § 35.

ENCUMBR.

See **CHARGES.**

ENHANCED VALUE.

is not "increase," §§ 185, 221.

of wife's property does not change its status, § 190.

ENTICEMENT.

See **ALIENATING AFFECTIONS.**

EQUITABLE ESTATES.

of wife, in proportion to her funds employed, § 223.

EQUITABLE ESTOPPEL.

of married women, § 127.

EQUITABLE LIEN.

upon separate estate, when, § 205.

none upon homestead for improvements, § 204.

EQUITABLE SEPARATE ESTATE.

of common law not specially denied wife, § 225.

EQUITABLE TITLE.

wife's title to community is, § 175.

wife's, where conveyance taken in husband's name, § 228.

EQUITY.

will not charge wife's estate with husband's contracts, §§ 37, 59, 234.

will require restoration by wife of benefits received under a contract when, § 72.

will not aid wife's defective deed, § 107.

of children, notice to purchaser, § 395.

ESTATE.

limited to wife for life, § 224.

to support homestead, § 252.

ESTATES OF DECEDENTS.

charged with debts of deceased in hands of heirs, §§ 363, 364, 375, 381, 388, 389, 392.

personal property primary fund for payment of debts, § 363.

descent of homestead, §§ 365, 373.

partition of homestead when, §§ 365, 371, 373, 374.

homestead not "charged with debts," § 365.

partition of exemptions and allowances, when, §§ 371, 373.

homestead liable for what debts, §§ 371, 373, 382.

rights of widow and children not affected by acts of deceased, § 372.

exemptions and allowances no part of, for administration, §§ 372, 373, 380, 381.

ESTATES OF DECEDENTS—continued.

exemptions and allowances must come from, §§ 372, 373, 379, 381.

application for partition where children's rights have never been determined, § 374.

community administration, § 375, see ADMINISTRATION OF COMMUNITY.

partition of community from separate, §§ 388, 391.

See also DESCENT; SURVIVOR.

ESTOPPEL.

of married women generally, §§ 126, 127, 129.

ratification by wife of husband's acts when, § 42.

accepting benefits of partition, §§ 64, 72.

wife making deed to husband creates none, § 87.

wife's authorizing another to appear and acknowledge for her, § 107.

of married women by deed to assert an after-acquired title, § 125.

of married woman by her fraud, §§ 128, 262.

illustrations of, as against married women, § 129.

by silence or laches, § 130.

by accepting benefits, §§ 131, 258, 264.

by pleadings, § 132.

of married women by declarations and admissions, when, §§ 133, 134, 270, 307.

as to homestead rights by act of husband, §§ 134, 262.

husband may bind community property by, § 135.

by deed, § 136.

by election, §§ 137, 162.

by inventory as administratrix, etc., § 138.

by judgment, §§ 139, 319.

husband may be bound by, as to homestead, § 259.

EVIDENCE.

of marriage, § 12.

to establish ratification by wife of husband's act, § 42.

to establish gift or transfer between husband and wife, §§ 84, 92.

not admissible to contradict legal effect of deed, § 85.

may be admitted showing deed to be mortgage, § 85.

not admissible to correct defective certificate, § 110.

impeaching certificate, § 113.

to overcome presumption of community admissible when, § 182.

to show separate character of property when standing in husband's name, § 216.

character of, to rebut presumption of community, § 232.

parol admissible to show resulting trust, § 241.

of abandonment of homestead, § 270.

unrecorded marriage contract not, when, § 275.

transactions with deceased, §§ 287, 304.

confidential communications, § 303.

husband and wife as witnesses for or against each other, §§ 305, 306.

declarations of husband and wife, § 307.

EVIDENCE—continued.

in divorce cases, §§ 347, 348, 349.

of *particeps criminis* in divorce, § 351.

EXCHANGE.

of community property for separate and *vice versa*, §§ 80, 142.

of exempt for nonexempt property, § 268.

of homestead for nonexempt property, § 268.

See also MUTATIONS.

EXECUTION.

in judgment against wife, §§ 315–317, 323.

against wife only, when, §§ 317, 323.

on wife's judgment issued at instance of husband, § 323.

against community, survivor, §§ 383, 399.

EXECUTOR OR EXECUTRIX.

wife's bond as, § 76.

See also REPRESENTATIVE CAPACITIES.

EXEMPTIONS.

miscellaneous, § 273.

homestead, §§ 243, 244, 251.

rent of homestead when, when not, § 255.

damages to homestead, § 255.

proceeds of sale of homestead, when, § 268.

voluntary exchange of exempt for nonexempt property, § 268.

proceeds of insurance policies on homestead, § 269.

of homestead destroyed by abandonment, § 270.

husband may dispose of, waive, or encumber the personal exemptions,
§§ 273, 290.

damages to exempt property; parties to action, § 290.

suits concerning personal, judgment against husband binds wife, § 321.

EXEMPTIONS, SETTING APART.

when done, § 371.

for whose benefit, §§ 371–373.

what is to be set apart, § 371.

if no exempted property, §§ 371, 373.

to whom delivered, §§ 371, 381.

property encumbered with liens, §§ 371, 373, 382.

where estate solvent, § 371.

where estate insolvent, §§ 371, 373, 380–382.

homestead liable for what debts, §§ 371, 373, 382.

personal, liable for what debts, § 371.

never to husband, § 372.

to children, only upon death of father, §§ 372, 381.

creditors cannot defeat, §§ 372, 379.

effect of order, § 372.

court has no power to order sale of, § 372.

DESCENT AND DISTRIBUTION.

- of community where husband or wife insane, §§ 31, 375, 388.
- of separate property, § 363.
- under Spanish law, § 363.
- where deceased leaves no children, § 363.
- where children also survive, § 363.
- of community property, §§ 364, 389, 392.
- no distinction between community personalty and realty, § 364.
- of wife's community will not dissolve a partnership of husband and another when, § 364.
- of homestead, § 365.

DESERTION.

- wife's refusal to remove to husband's domicil, § 28.
- See also ABANDONMENT.

DESIGNATING HOMESTEAD.

- statute, §§ 257, 262.

DETACHED TRACTS.

- See SEPARATE TRACTS.

DEVISEES.

- rights of, discussed, § 159.
- rights in homestead, § 159.

DEVISE OR DESCENT.

- property acquired by, separate, §§ 209, 214, 220.
- devise of issues, rents, or fruits, separate, § 220.
- descent of property acquired by, § 363.

DISSOLUTION OF MARRIAGE.

- starts limitations, § 310.
- mere separation is not, § 324.
- terminates community, §§ 177, 201, 324.
- terminates status of parties, § 324.
- effected by death or divorce, § 324.
- effect on pending suits, § 325.
- presumptions as to property, §§ 184, 326, 354, 395.

DIVORCE.

- relation of subject to marital law, § 327.
- cruelty and violence to person, §§ 30, 333.
- decree of, terminates community, §§ 177, 324.
- action for, may be maintained by wife without intervention of next friend, etc., § 283.
- determines the status or relation of married women, § 327.
- early laws concerning, § 327.
- Spanish law of, § 327.

DIVORCE—continued.

- grounds for, generally, § 320.
- impediments rendering marriage void, §§ 329, 330.
- impotency, § 330.
- incestuous marriage, § 330.
- intermarriage between whites and blacks, § 330.
- bigamous marriages, § 330.
- insanity, § 330.
- party of immature years, § 330.
- fraud, §§ 15, 330, 332.
- wife *enceinte* at marriage, § 331.
- antenuptial incontinence of wife, § 331.
- false affidavit for license, § 332.
- substituting another for the intended husband or wife, § 332.
- marriage to escape punishment for violation of seduction law, § 332.
- cruelty, excesses, and outrages, §§ 30, 333.
- communication of venereal disease, § 333.
- cruelty and outrages affecting the mind only, § 334.
- false charges, slander, and mental injuries, § 334.
- charging wife with unchastity, § 334.
- murder by husband of wife's child, § 334.
- threats to murder wife, § 334.
- charges of unchastity against husband, § 334.
- quarreling, § 334.
- incompatibility of tempers, § 334.
- failure to support, § 334.
- failure to supply medicine and a physician as cruelty, § 334.
- abandonment as ground, § 335.
- intention to abandon, § 335.
- separation by consent not abandonment, § 335.
- abandonment must be for three years, § 335.
- offer to return to conjugal society, § 335.
- abandonment justified, § 335.
- involuntary absence not abandonment, § 335.
- adultery, § 336.
- of husband and wife contrasted, § 336.
- recrimination in adultery, §§ 336, 345.
- imprisonment for felony as ground, § 337.
- not granted within a year, § 337.
- not granted after pardon of convict, § 337.
- not granted for imprisonment when, § 337.
- drunkenness as ground, § 338.
- insanity as ground, § 338.
- opium eating as ground, § 338.
- religious belief, etc., as ground, § 338.
- causes arising outside of state, § 339.
- conveyances *pendente lite*, § 340.
- pending, wife may require inventory and injunction, § 340.
- M. W. — 33.

DIVORCE—continued.

- court may make orders respecting parties and property, § 340.
- the petition, § 341.
- petition must show venue, § 341.
- allegations of residence, § 341.
- allegations of marriage, § 341.
- allegations of grounds for, § 341.
- allegations of cruelty, outrages, etc., § 341.
- allegations of abandonment, § 341.
- allegations of adultery, § 341.
- allegations of incarceration in penitentiary, § 341.
- allegations of impediment to contract, § 341.
- allegations concerning property, § 341.
- the citation, § 342.
- citation by publication, § 342.
- citation to nonresident by notice, § 342.
- the answer, § 343.
- petition not taken as confessed for want of answer, § 343.
- plaintiff must make full proof, §§ 343, 352.
- extent of defendant's right to introduce testimony without answer, § 343.
- presumptions, § 344.
- charges by husband against wife, presumed untrue, § 344.
- presumption of paternity of child, § 344.
- presumption alone will not establish marriage, § 344.
- presumption of divorce when, § 344.
- recrimination, § 345.
- must arise out of acts of plaintiff, shown as ground, § 345.
- misconduct of plaintiff must be of same general character of defendant's, § 345.
- plaintiff need not be wholly blameless, § 345.
- slight degrees of difference in plaintiff's and defendant's guilt, § 345.
- condonation, § 346.
- revival by new acts, § 346.
- condonation in adultery cases, § 346.
- rule of condonation less stringent when applied to wife, § 346.
- quantum* of proof required, § 347.
- residence of plaintiff for prescribed time must be proved, § 347.
- marriage must be proved, § 347.
- marriage may be shown by circumstances, § 347.
- admissions in defendant's answer, §§ 347, 352.
- proof must satisfy court as well as jury, § 347.
- trial court's action subject to review, § 347.
- sufficient proof, illustrations, § 348.
- parties as witnesses, § 349.
- collusion between parties, §§ 349, 350.
- admissions of parties, § 349.
- agreements not necessarily collusion, § 350.

DIVORCE—continued.

testimony of *particeps criminis*, § 351.

the decree generally, § 352.

a mensa et thoro, § 352.

children not made illegitimate by, § 352.

either party to, may marry again, § 352.

court may change name of either party, § 352.

decree need not adjust property rights, custody of children, etc., §§ 352, 354, 361.

suits dismissed if proof insufficient when, § 352.

decree should settle property rights, § 353.

court's power extends to what property, §§ 353, 361.

division of community generally, §§ 353, 354.

disposition of separate property generally, § 353.

debts, §§ 353, 354.

placing property in hands of trustee, § 353.

discretion of court in disposition of property, §§ 353, 354.

accounting between parties, §§ 354, 357.

rights of parties in property where not determined in divorce proceedings, § 354.

presumption as to property upon, § 354.

homestead, § 355.

court may partition homestead, § 355.

court may set apart homestead to one of the parties, § 355.

parties become tenants in common in community homestead when, § 355.

divesting title to real estate, § 356.

ordering sale of separate real estate, § 356.

may order sale of community real estate, § 356.

setting apart separate real estate is not "divesting title," § 356.

sale of community homestead not a divesting of title, § 356.

alimony, § 357; See also ALIMONY.

costs, statute, § 358.

prevailing party entitled to costs, § 358.

discretion of courts as to costs, § 358.

costs may be adjudged a lien, § 358.

wife's attorney fees not costs, § 358.

custody of children, §§ 359, 364, 362.

statute of custody of children, § 359.

placing child with third person, § 359.

good of child primary consideration, § 359.

setting apart property to support child, § 359.

manner of making allowance for support of child, § 359.

enforcement of allowance for support of child, § 359.

conclusiveness of award of children, § 360.

finality of divorce decree generally, § 361.

decree without service on defendant, § 361.

erroneous decree reversed, void *ab initio*, § 361.

when decree affects property, § 361.

DIVORCE—continued.

- decree set aside as other judgments, § 361.
- conflict of laws, § 362.
- extraterritorial force of judgment, § 362.
- decree where court has no jurisdiction, § 362.

DIVORCED WIFE.

- cannot charge husband, § 324.
- cannot sue former husband for tort, §§ 155, 283, 325.
- cannot bind husband by her contracts, §§ 50, 324.
- suits by, concerning community, § 287.
- may testify against former husband when, §§ 305, 324.

DOMICIL.

- of wife discussed, §§ 28, 34, 272.
- of wife at Spanish law, § 22.
- right to select, §§ 256, 271, 272.
- intended, §§ 27, 34, 272.

DONATION.

- rule with respect to, between husband and wife at Spanish law. § 79.
- by state to families as community, § 198.
- of homestead by government, § 199.
- by government to husband, § 200.

See also GIFTS AND CONVEYANCES BETWEEN HUSBAND AND WIFE.

DURESS.

- as avoiding marriage, § 15.
- of husband, § 48.
- as avoiding conveyance, § 114.

See also FRAUD.

EARNINGS.

- during marriage are community, §§ 184 203.
 - wife's during marriage are community, § 186.
 - husband may give wife's to her when, §§ 186, 219.
 - gift of future, by husband to wife, § 218.
 - of parties after divorce, § 324.
- See also INCREASE; PROFITS; REVENUES.

EASEMENT.

- husband cannot create, across wife's land, § 37.
- across homestead, § 260.

ELECTION.

- by wife under will, § 162.
- by wife as an estoppel, § 137.

EMPLOYMENT.

- of husband as wife's agent, § 35.

ENCUMBR.

See **CHARGES.**

ENHANCED VALUE.

is not "increase," §§ 185, 221.

of wife's property does not change its status, § 190.

ENTICEMENT.

See **ALIENATING AFFECTIONS.**

EQUITABLE ESTATES.

of wife, in proportion to her funds employed, § 223.

EQUITABLE ESTOPPEL.

of married women, § 127.

EQUITABLE LIEN.

upon separate estate, when, § 205.

none upon homestead for improvements, § 264.

EQUITABLE SEPARATE ESTATE.

of common law not specially denied wife, § 225.

EQUITABLE TITLE.

wife's title to community is, § 175.

wife's, where conveyance taken in husband's name, § 228.

EQUITY.

will not charge wife's estate with husband's contracts, §§ 37, 59, 234.

will require restoration by wife of benefits received under a contract when, § 72.

will not aid wife's defective deed, § 107.

of children, notice to purchaser, § 395.

ESTATE.

limited to wife for life, § 224.

to support homestead, § 252.

ESTATES OF DECEDENTS.

charged with debts of deceased in hands of heirs, §§ 363, 364, 375, 381, 388, 389, 392.

personal property primary fund for payment of debts, § 363.

descent of homestead, §§ 365, 373.

partition of homestead when, §§ 365, 371, 373, 374.

homestead not "charged with debts," § 365.

partition of exemptions and allowances, when, §§ 371, 373.

homestead liable for what debts, §§ 371, 373, 382.

rights of widow and children not affected by acts of deceased, § 372.

exemptions and allowances no part of, for administration, §§ 372, 373, 380, 381.

ESTATES OF DECEDENTS—continued.

exemptions and allowances must come from, §§ 372, 373, 379, 381.

application for partition where children's rights have never been determined, § 374.

community administration, § 375, see ADMINISTRATION OF COMMUNITY.

partition of community from separate, §§ 388, 391.

See also DESCENT; SURVIVOR.

ESTOPPEL.

of married women generally, §§ 126, 127, 129.

ratification by wife of husband's acts when, § 42.

accepting benefits of partition, §§ 64, 72.

wife making deed to husband creates none, § 87.

wife's authorizing another to appear and acknowledge for her, § 107.

of married women by deed to assert an after-acquired title, § 125.

of married woman by her fraud, §§ 128, 262.

illustrations of, as against married women, § 129.

by silence or laches, § 130.

by accepting benefits, §§ 131, 258, 264.

by pleadings, § 132.

of married women by declarations and admissions, when, §§ 133, 134, 270, 307.

as to homestead rights by act of husband, §§ 134, 262.

husband may bind community property by, § 135.

by deed, § 136.

by election, §§ 137, 162.

by inventory as administratrix, etc., § 138.

by judgment, §§ 139, 319.

husband may be bound by, as to homestead, § 259.

EVIDENCE.

of marriage, § 12.

to establish ratification by wife of husband's act, § 42.

to establish gift or transfer between husband and wife, §§ 84, 92.

not admissible to contradict legal effect of deed, § 85.

may be admitted showing deed to be mortgage, § 85.

not admissible to correct defective certificate, § 110.

impeaching certificate, § 113.

to overcome presumption of community admissible when, § 182.

to show separate character of property when standing in husband's name, § 216.

character of, to rebut presumption of community, § 232.

parol admissible to show resulting trust, § 241.

of abandonment of homestead, § 270.

unrecorded marriage contract not, when, § 275.

transactions with deceased, §§ 287, 304.

confidential communications, § 303.

husband and wife as witnesses for or against each other, §§ 305, 306.

declarations of husband and wife, § 307.

VIDENCE—continued.

- in divorce cases, §§ 347, 348, 349.
- of *particeps criminis* in divorce, § 351.

XCHANGE.

- of community property for separate and *vice versa*, §§ 80, 142.
 - of exempt for nonexempt property, § 268.
 - of homestead for nonexempt property, § 268.
- See also MUTATIONS.

XECUTION.

- in judgment against wife, §§ 315–317, 323.
- against wife only, when, §§ 317, 323.
- on wife's judgment issued at instance of husband, § 323.
- against community, survivor, §§ 383, 399.

EXECUTOR OR EXECUTRIX.

- wife's bond as, § 76.
- See also REPRESENTATIVE CAPACITIES.

EXEMPTIONS.

- miscellaneous, § 273.
- homestead, §§ 243, 244, 251.
- rent of homestead when, when not, § 255.
- damages to homestead, § 255.
- proceeds of sale of homestead, when, § 268.
- voluntary exchange of exempt for nonexempt property, § 268.
- proceeds of insurance policies on homestead, § 269.
- of homestead destroyed by abandonment, § 270.
- husband may dispose of, waive, or encumber the personal exemptions, §§ 273, 290.
- damages to exempt property; parties to action, § 290.
- suits concerning personal, judgment against husband binds wife, § 321.

EXEMPTIONS, SETTING APART.

- when done, § 371.
- for whose benefit, §§ 371–373.
- what is to be set apart, § 371.
- if no exempted property, §§ 371, 373.
- to whom delivered, §§ 371, 381.
- property encumbered with liens, §§ 371, 373, 382.
- where estate solvent, § 371.
- where estate insolvent, §§ 371, 373, 380–382.
- homestead liable for what debts, §§ 371, 373, 382.
- personal, liable for what debts, § 371.
- never to husband, § 372.
- to children, only upon death of father, §§ 372, 381.
- creditors cannot defeat, §§ 372, 379.
- effect of order, § 372.
- court has no power to order sale of, § 372.

EXEMPTIONS, SETTING APART—continued.

- beneficiaries having income, immaterial, § 372.
- right to, a preferential claim, § 372.
- right to, not defeated by administrator, § 372.
- come from estate of deceased, §§ 372, 379, 381.
- whether widow may sell interest of children in, § 372.
- the homestead, § 373.
- rural or urban homestead, § 373.
- residence or business homestead, § 373.
- selecting homestead, § 373.
- must be a constituent to claim the homestead, §§ 373, 374.
- rights in homestead same whether separate or community property, §§ 373, 379.
- incompetent homestead, § 373.
- cannot be both exemption and allowance, § 373.
- survivor and other beneficiaries entitled to rent free, § 373.
- if deceased leave homestead on wife's land, none set apart, and no allowance in lieu, §§ 373, 381.
- what persons are beneficiaries of homestead, §§ 374, 381.
- grandchild as beneficiary, § 374.
- "unmarried daughters" remaining with family, § 374.
- the order setting apart homestead need not be recorded as conveyance, § 374.
- power of district court, § 374.
- in community administration, § 379.
- what included in order, § 380.
- sales of, by survivor, §§ 372, 378, 381.
- liens upon, §§ 371, 373, 382.

EXEMPT PROPERTY.

- not fraudulent to donate or convey, § 93.
- husband's gift of, to wife not fraudulent, § 217.

EXPLANATION.

- of instrument to wife, § 107.
- certificate should show, § 108.
- whether conveyance may be avoided for lack of, § 114.

See also PRIVY EXAMINATION.

FALSE SWEARING.

- in obtaining license, § 15.

FAMILY.

- husband the head, §§ 20, 22.
- colonial grants to, § 198.
- exemption of homestead is to, § 245.
- miscellaneous exemptions to, § 273.
- library, portraits, and pictures exempt, § 273.
- may be two after divorce, § 324.

FARM.

as business homestead, § 253.

FEES.

See ATTORNEYS' FEES.

FEME COVERT.

See COVERTURE; WIFE.

FEME SOLE.

wife acts as, when, §§ 105, 115, 116.

trusts for, in contemplation of marriage, § 238.

FICTION OF UNITY.

discussed, §§ 1, 25, 43, 45, 49.

wife takes husband's name, § 17.

forbade gifts between husband and wife, § 79.

as affecting husband's liability for wife's torts, § 153.

as affecting wife's right to sue husband for torts, § 155.

as affecting wife's right to sue for alienation of husband's affections,
§ 291.

husband and wife as witnesses, § 302.

FOOD.

a "necessary," § 54.

and shelter for wife's stock, § 60.

FOREIGN.

See CONFLICT OF LAWS.

FORUM.

See CONFLICT OF LAWS.

FRAUD.

affecting marriage contracts, §§ 15, 332.

in procuring wife's acknowledgment, §§ 113, 114, 150.

creating estoppel against married women, §§ 128, 132.

conversion of nonexempt property into homestead, not, § 251.

as vitiating marriage contract, § 277.

wife *enceinte* at marriage, § 331.

antenuptial incontinence of wife, whether, § 331.

See also DURESS.

FRAUDULENT CONVEYANCES.

insolvent husband paying wife, §§ 90, 93.

between husband and wife, § 217.

by husband of homestead, § 259.

FRAUDULENT REPRESENTATIONS.

of husband as binding on wife, § 42.

of wife as an estoppel, §§ 127-129.

FUEL.

taken from wife's land, § 189.

FULL AGE.

See AGE.

GAINS.

See EARNINGS; PROFITS.

GANANCIAL GOODS.

of Spanish law, §§ 22, 168.

See also COMMUNITY PROPERTY.

GARDEN.

as part of the homestead, §§ 249, 253.

GARNISHMENT.

by wife, § 76.

of proceeds of sale of homestead, § 268.

by wife against husband, § 283.

GIFT.

property acquired by, §§ 169, 186, 209, 216.

by husband to wife, §§ 172, 205, 214, 216, 217, 218, 219.

abandonment of wife by husband tantamount to, of community, when, § 177.

by husband of wife's earnings to her, § 186, 218.

to wife may be from any source, § 216.

to wife may be a compensation for services, yet a donation, § 216.

to husband and wife jointly, separate estates, § 216.

of rents and revenues of trust estate, § 225.

descent of property acquired by, § 363.

GIFTS AND CONVEYANCES BETWEEN HUSBAND AND WIFE.

at common law, § 79.

with us, §§ 79-81, 93, 172, 191, 195, 217, 278.

of community property, §§ 80, 205, 217, 224.

verbal, § 83.

declaration of parties, §§ 85, 217.

of wife to husband, § 86.

husband depositing money in wife's name, § 92.

husband causing title to be taken in wife's name, § 217.

fraudulent, § 217.

of exempt property, § 217.

of future acquisitions, § 218.

rights of creditors, § 218.

of wife's personal earnings, § 219.

wife's pin money, § 219.

insuring husband's life in wife's favor, § 227.

GRANDCHILD.

- as heir formerly, § 364.
- as beneficiary of probate exemption, § 374.

GRANTS.

- See DONATIONS.

GRAVEL.

- dug from wife's land, §§ 189, 221.

GROCERIES.

- "necessary," § 57.

GUARANTOR.

- See SURETY.

GUARDIAN.

- of insane husband, §§ 31, 166, 292.
- suits by, §§ 31, 292.
- capacity of married woman to act as, §§ 32, 164, 282.
- of minor husband, § 116.
- of minor children, §§ 165, 284.
- wife as, of insane and habitual drunkard husband, §§ 166, 292.
- of minor children of deceased, homestead rights, §§ 365, 371, 374, 381.
- of insane wife, unnecessary, husband may sue, § 292.

GUN.

- one exempt, § 273.

HABITUAL DRUNKARD.

- support of, § 166.
- receiver of estate of, § 166.
- See also GUARDIAN; INSANE; LIQUOR DEALER.

HAY.

- cut from wife's land, §§ 189, 221.

HEAD OF FAMILY.

- husband as, at Spanish law, § 22.
- with us, §§ 20, 28, 256.
- when husband has abandoned wife or is insane, §§ 31, 67, 257, 284, 287.
- business homestead of, § 253.
- may designate homestead, § 257.
- after divorce, §§ 324, 355.

HEIR.

- of deceased parents, § 363.
- cotenants, when, § 363.
- takes property subject to debts of deceased, § 363.
- not liable personally for deceased's debts, § 363.
- "descendants" of children not, formerly, § 364.

HEIR—continued.

- all children of every marriage inherit, § 364.
 - right of, is not a "marital right," § 364.
 - entitled to a partition, when, § 364.
 - property of, liable for his debts, § 364.
 - of mother, not affected by act of father's administrator, § 364.
 - husband and wife as heirs of each other, irregular marriage, § 364.
 - entitled to a partition of homestead, when, §§ 365, 373.
 - homestead right does not descend to, §§ 372, 381.
- See also CHILD; CHILDREN.

HIRE.

- as community, §§ 184, 188.
- is not "increase," § 188.

See also RENT.

HOGS.

- twenty exempt, § 273.

HOME.

See DOMICIL.

HOME AND FOREIGN LAW.

See CONFLICT OF LAWS.

HOMESTEAD.

- husband cannot bind wife in suits concerning, §§ 37, 321.
- may be disposed of by separation deeds, § 91.
- when wife alone may convey it, § 105.
- conveyance of, generally, § 117.
- wife's conveyance, § 117.
- wife's power of attorney to convey, § 120.
- wife's bond for title to, §§ 122, 261, 394.
- liens for improvements, §§ 124, 264.
- estoppel to assert, §§ 129, 262.
- estoppel by act of husband alone, §§ 134, 135, 262.
- as affected by will, § 159.
- wife's abandoning, §§ 177, 272.
- pre-emption is community, § 199.
- husband may give to wife, not fraudulent, § 217.
- husband paying wife to sign conveyance of, § 217.
- constitutional exemption of, § 243.
- definition, § 243.
- statutory definition and exemption, § 244.
- statutes, their scope and object discussed, § 244.
- nature of wife's interest in, §§ 245, 259, 290.
- when rights arise, §§ 245, 272.
- actual occupancy not required, §§ 245, 247.
- what is, residence, §§ 246, 249.
- dedication of, acts indicating, §§ 247, 248.
- isolated buildings and structures, § 247.

HOMESTEAD—continued.

- intention to designate, §§ 247, 248.
- cannot be two at the same time, §§ 247, 250, 272.
- in separate tracts or lots, § 249.
- whether rural or urban, § 250.
- power of cities and towns to include rural, § 250.
- limitations as to quantity and value, § 251.
- the estate to support, § 252.
- may be chattel, § 252.
- upon leased land, § 252.
- business homestead, § 253.
- things affixed to realty, homestead, § 254.
- issues, rents, and damages, § 255.
- the right to select, §§ 256, 271.
- designating, statute, § 257.
- sale generally, §§ 258, 290.
- sale by husband, when, §§ 259, 295, 381, 394.
- husband's agreement to arbitrate boundary, invalid, § 259.
- husband may lease, § 259.
- easements, § 260.
- cannot be mortgaged, § 262.
- mortgage, if no wife, §§ 262, 396.
- abandonment of, will not aid mortgage, § 262.
- mechanic's lien on, § 263.
- constitutional liens for improvements, § 264.
- purchase money, § 265.
- husband may renew purchase-money note, even though barred, § 265.
- "other liens," § 266.
- levy creates no lien against, § 266.
- judgment liens, § 266.
- taxes due on, § 267.
- special city assessment not a "tax," § 267.
- not liable to state for ordinary demands, § 267.
- proceeds of voluntary sale exempt, when, § 268.
- proceeds of insurance on, §§ 269, 305.
- husband may waive the exemption of insurance proceeds on homestead, § 269.
- abandonment of, § 270.
- temporary renting, § 270.
- when abandonment of, in fraud of wife, § 271.
- living apart, § 272.
- mutual division of, § 272.
- husband can acquire none to exclusion of wife, § 272.
- actions concerning, parties, §§ 290, 295.
- limitation against husband concerning, binds wife, when, § 310.
- judgment against husband concerning, not binding on wife, § 321.
- disposition upon divorce, § 355.
- after divorce, § 355.

HOMESTEAD—continued.

descent of, § 365.

partition of, §§ 365, 371.

survivor's rights in, § 365.

minor children of deceased, § 365.

rights of survivor and minor children in, see **ALLOWANCES IN LIEU OF EXEMPTIONS; ESTATES OF DECEDENTS; EXEMPTIONS; SETTING APART; SURVIVOR, ETC.**

sales by survivor, where owner, § 396.

See also **BUSINESS HOMESTEADS.**

HORSES.

two exempt, § 273.

HOUSE.

See **HOMESTEAD; STORE HOUSE.**

HOUSEHOLD AND KITCHEN FURNITURE.

exempt, § 273.

HUSBAND.

must support wife under Spanish law, § 22.

head of family, §§ 20, 22.

selects the wife's domicile, §§ 28, 256, 271.

power to select domicile not arbitrary, § 28.

must support his wife, §§ 29, 51, 171.

at common law had right of moderate correction, § 30.

insane, §§ 31, 103, 166, 292.

abandoning wife, §§ 31, 287.

as wife's agent, generally, §§ 35, 42, 154, 280.

receiving wife's money, § 35.

right to control and manage wife's separate property, §§ 36, 37, 58, 205, 321, 323.

no power to charge or convey wife's property, §§ 37, 39, 58, 82, 151, 210, 234.

his contracts for benefit of wife's property, § 37.

his liability for conversion of wife's property, §§ 38, 88, 151.

a trustee for wife, § 38.

his separate property liable to wife, when, § 38.

his authority to sign wife's name, §§ 39, 47, 151.

cannot convey wife's realty by power of attorney from her, § 41.

undue influence of, §§ 48, 114.

"necessaries" for, § 58.

may bind himself in contract for benefit of wife's property, § 61.

whether liable upon wife's contracts for benefit of her separate property, § 61.

insuring wife's property, § 73.

insane or absent from state, wife's power to make bond as executrix or administratrix, § 76.

his deed to his wife, § 81.

HUSBAND—continued.

- borrowing wife's money, §§ 88, 218.
- paying his wife, §§ 90, 93, 218, 224.
- hiring wife to live with him, § 91.
- confinement of, in penitentiary, §§ 105, 292.
- delivering wife's deed, § 114.
- has exclusive right to manage and convey community, §§ 116, 147, 169, 171, 176, 207, 287.
- insane or a minor, wife's power to convey the community, § 116.
- habitual drunkard, §§ 116, 166.
- conveying the homestead, §§ 117, 259, 265, 295.
- cannot bind homestead by estoppel, except, §§ 134, 135.
- may bind community property by estoppel, § 135.
- selling community in fraud of wife, §§ 147, 148, 207.
- extent of his liability in administering the community, §§ 150, 176, 202.
- his liability for wife's torts, § 153.
- his torts in management of wife's business, § 154.
- not liable to wife for his torts, §§ 155, 283.
- his earnings, extent of wife's interest in, § 178.
- conveying community to stranger to be reconveyed to wife, § 183.
- not liable for use of wife's property, § 191.
- land certificates as his separate property, § 200.
- not liable for wife's antenuptial debts, § 203.
- may mortgage the community, § 207.
- may donate his interest in homestead to wife, 217.
- paying wife to convey homestead, § 217.
- may convey in trust for use of wife, § 225.
- policy on life of, in wife's favor, § 227.
- death of, terminates wife's trust, § 238.
- taking wife's conveyance in his own name, resulting trust, § 239.
- husband's purchases with money borrowed from wife creates no resulting trust, § 239.
- his business homestead, § 253.
- may abandon business homestead, § 253.
- his right to select homestead, §§ 256, 259, 265, 271, 295.
- his power to abandon homestead, §§ 256, 270, 271, 272.
- cannot agree to arbitrate boundary of homestead, § 259.
- may lease or grant easement in the homestead when, §§ 259, 260.
- may renew barred purchase-money note against the homestead, § 265.
- may waive exemption of proceeds of insurance on homestead, § 269.
- may dispose of the personal exemptions, § 273.
- whether may be excluded by marriage contract from all interest in wife's property after her death, §§ 276, 278.
- must be sued with wife, § 281.
- husband's failure to sue for wife discussed, §§ 284, 286, 287.
- suits by, in behalf of wife, §§ 286, 292.
- alone sues for recovery of community, §§ 287, 292.
- may join wife's cause of action with his own, when, § 286.

HUSBAND—continued.

may make compromise of community suit, § 287.
 need not join wife in suit on liquor dealer's bond, § 289.
 refusing to sue to recover homestead, § 290.
 may bring and prosecute suit concerning homestead, § 290.
 may bind the wife by his suit, when, §§ 286, 290.
 insane wife's suits, § 292.
 insane, guardian's suits, § 292.
 insane, wife cannot sue for him, § 292.
 infancy of, his suits, § 292.
 may sue for insane wife, § 292.
 no authority to defend wife's suits, § 293.
 should always be sued with wife, § 296.
 suing for wife, pleadings, § 299.
 cannot arrest limitations in wife's favor, § 312.
 judgment against, binds wife, when, § 321.
 has control of wife's judgment, § 323.
 death of, effect on pending suits, §§ 286, 325.
 powers pending divorce, § 340.

See also JOINDER OF HUSBAND.

HUSBAND AND WIFE.

slaves as, § 5.
 "living together" as, marriage, § 11.
 as witnesses to prove marriage, § 12.
 conduct as evidence of marriage, § 12.
 natural relation discussed, § 20.
 relation at common law, § 21.
 husband must support wife, § 29.
 husband's authority over wife's person, §§ 30, 274.
 wife's power of attorney to husband, §§ 41, 101, 207.
 contracts between, §§ 49, 172.
 joint contract for benefit of wife's property, § 60.
 as principal and surety, § 75.
 wife signing husband's bond, § 76.
 gifts and conveyances between, at common law, § 79.
 donations, etc., between, at Spanish law, § 79.
 with us, §§ 79-81, 172, 191, 195.
 husband's deed to wife, § 82.
 wife as creditor of husband, §§ 88, 145.
 husband may make mortgage to secure wife, § 89.
 may acknowledge conveyance at different times and before different officers, § 101.
 making separate deeds, § 101.
 wife no power to convey husband's property where he is insane, § 103.
 wife's silence as creating an estoppel against her in husband's favor, § 130.
 acts of husband with respect to community bind wife, § 135.

HUSBAND AND WIFE—continued.

- cannot be partners in business, § 141.
- actions between, for fraud, § 147.
- wife's torts, husband's liability, § 153.
- wife as husband's accessory in crime, § 156.
- wills of, §§ 158, 161.
- agreement to make mutual wills, § 161.
- respective rights in the community property, § 171.
- meretricious unions, § 178.
- illicit relations do not constitute parties, §§ 178, 364.
- gift by husband of wife's earnings, when, §§ 177, 186.
- either may contract a "community" debt, § 202.
- antenuptial debts of; community liable, § 203.
- accounting between, not required, § 203.
- their individual debts contracted during marriage, § 204.
- become tenants in common in common property upon dissolution of marriage, §§ 204, 324, 354, 355.
- nonresidents, property rights, § 208.
- respective capacities to hold and own separate estates, § 210.
- donations of exempt property between, not fraudulent, § 217.
- trust in wife's favor continues during their joint lives, § 237.
- homestead cannot be mortgaged by one to other, § 262.
- homestead rights when living apart, § 272.
- joint intention to abandon homestead required, when, § 272.
- wife may claim husband's homestead if she wish, § 272.
- his authority over her person cannot be impaired by agreement, § 274.
- cannot alter legal orders of descent by contract, §§ 276, 278.
- cannot affect status of their property by mere agreement, §§ 144, 172, 218, 278.
- his agreements in wife's suits, §§ 37, 280.
- must be jointly sued, § 281.
- his refusal to sue and join entitles her to sue, when, §§ 282, 286.
- his assent to wife's suits not required, § 282.
- wife suing husband, §§ 283, 284.
- may sue jointly to recover wife's separate property, §§ 284, 286.
- her suits when he has abandoned her, § 284.
- husband may sue for wife, generally, § 286.
- his negligence imputable to her, when, § 287.
- may join in action for damages for death of child, § 288.
- may join in action to recover homestead, § 290.
- action for alienating husband's affections, § 291.
- jointly sued, when, §§ 294, 296.
- should be jointly sued concerning homestead, § 295.
- not competent witnesses at common law, § 302.
- may testify where one a party to suit, present rule, § 303.
- as witness for or against each other, statute, § 305.
- offense committed by one against the other, witness, § 305.
- rule excluding testimony of, invalid marriages, § 306.

HUSBAND AND WIFE—continued.

- parties living in illicit relations, their testimony, § 306.
- limitations against husband bind wife, when, § 310.
- husband cannot waive plea of limitations for wife, § 312.
- he cannot revive barred claim against wife's property, § 312.
- he cannot by new promise arrest limitations in wife's favor, § 312.
- she cannot arrest running of statute of limitations in husband's favor § 312.
- husband pleading limitations against wife, § 314.
- their relation generally after divorce, § 324.
- their pending suits, divorce, § 325.
- wife suing husband after divorce, § 325.

See also HUSBAND; WIFE.

IDENTITY.

- of husband and wife, §§ 1, 21, 22, 25.
- of wife recognized, §§ 79, 126.

IDIOCY.

- as affecting marriage, § 14.

See also INSANE.

IMMOVABLES.

- by what law governed, §§ 34, 279.

IMPEACHMENT.

- of husband's deed to wife, § 82.
- of officer's certificate to conveyance, §§ 113, 114.

IMPEDIMENT.

- to marriage, §§ 329, 330.

IMPLEMENTS OF HUSBANDRY.

- exempt, § 273.

IMPLIED.

- contract to marry, § 2.
- agency of wife, § 32.
- agency of husband for wife discussed, § 35.
- of wife for husband, §§ 50, 57, 67.
- donation of husband of wife's earnings, when, § 219.
- assent of husband to wife's purchases on credit, discussed, § 228.

IMPOTENCY.

- as affecting capacity to contract marriage, §§ 3, 14.
- as ground for dissolution of marriage, statute, §§ 329, 330.

IMPRISONMENT FOR FELONY.

- ground for divorce, § 337.
- of husband, §§ 105, 292, 296.

IMPROVEMENTS.

- placed upon land held under wife's defective deed, § 112
- placed upon separate, from common estate, § 205.
- include what, under mechanic's lien law, § 263.
- on homestead, lien when, § 264.
- value of, on homestead immaterial, §§ 251, 269.

INCEST.

- by husband, wife as witness, § 305.

INCHOATE MARRIAGE.

- § 6.

INCOME.

- See EARNINGS; INTEREST.

INCORPOREAL PROPERTY.

- community property includes, § 184.
- separate property includes, § 224.

INCREASE.

- of wife's property at Spanish law, §§ 168, 185.
- of wife's property other than land is community, § 185.
- of wife's property defined, § 185.
- of slaves under early law, § 222.

See also PROFITS; RENTS; REVENUES.

INCREASE OF LANDS.

- discussed, § 221.
- crops not, § 187.
- is separate property. §§ 209, 214.

INDIAN CUSTOMS AND FORMS.

- as to marriage, § 11.

INDORSER.

- See SUBETY.

INFANCY.

- of female, marriage contract, § 3.
- as impediment to marriage, §§ 6, 14.
- of female removed by marriage, § 18.
- of male not removed by marriage, § 102.
- cannot tack coverture to, § 313.

INJUNCTION.

- by wife pending divorce, § 340.
- by wife against sale of her property, pleadings, § 298.
- by husband against another's collecting wife's notes, § 286.
- to restrain sale of wife's property, when, §§ 233, 282, 298.
- by wife against husband, § 283.

INJURIES.

- damages for personal, community, §§ 193, 196.
- to community, damages for are community. § 194.
- to wife's separate property, damages, §§ 229, 286.
- to wife's person, husband's negligence, § 278.
- resulting in death, actions, § 288.

INNOCENT PERSONS.

- wife of invalid marriage, §§ 16, 178.
- under marriage settlement, § 27.
- purchasers from husband of wife's negotiable paper, §§ 39, 47, 233.
- not protected by false certificate of acknowledgment, when, § 107.
- defective acknowledgments, when protected, §§ 112, 113.
- not affected by fraud of husband, §§ 114, 150.
- bona fide purchasers of community from husband, § 149.
- purchaser of community from husband when title stands in name of wife, §§ 180, 181.
- purchasers from husband are not, after record of wife's schedule, § 212.
- notes not limited to separate use of wife, § 224.
- purchasers from husband of wife's property, when, § 233.
- resulting trusts, §§ 239, 240, 241.
- secret intention to dedicate property as homestead, rights of, § 248.
- purchasers of homestead from husband, §§ 259, 272.
- mortgagees of homestead, § 262.
- record of marriage contract, § 275.
- purchasers from husband pending divorce, not protected when, § 340.
- purchasers from survivor, § 395.

See also BONA FIDE PURCHASERS.

IN PAIS.

- estoppel by acts, generally, § 126.

INSANE.

- husband and wife, guardianship, §§ 31, 103, 166.
- spouse, descent of community property, §§ 31, 104, 375, 388.
- husband, wife's power to make bond, § 76.
- husband, wife's conveyance of community, § 116.
- husband, support of family, §§ 103, 166.
- husband or wife, support of, §§ 167, 234.
- wife, sale of homestead, §§ 259, 272.
- husband, wife's suits, § 292.
- husband or wife, administration, §§ 375, 387.

INSOLVENT ESTATE.

- homestead rights, §§ 159, 371-373, 380, 382.

INSURANCE.

- upon wife's property, § 60.
- wife's contracts for, § 73.
- policy of, when community, § 195.

INSURANCE—continued.

- policy of, when separate, § 227.
- upon homestead, § 269.
- partition of insurance upon homestead, § 365.
- policy payable to creditor, no part of deceased's estate, § 372.

INTENDED DOMICIL.

- §§ 27, 34, 272, 279.

INTENTION.

- of parties in transaction between husband and wife, § 85.
- as affecting construction of will, § 160.
- as evidencing gift between husband and wife, § 195.
- as affecting wife's purchases on credit, § 228.
- to dedicate property as homestead, § 245.
- evidencing dedication of homestead, §§ 247, 248.
- to dedicate where another is actually the homestead, § 248.
- to abandon homestead, §§ 248, 270.
- to dedicate homestead, how shown, § 248.
- as affecting construction of marriage contract, § 276.

INTERCOURSE.

- See COHABITATION.

INTEREST.

- on wife's investment, community, § 185.
- on wife's money, §§ 191, 224.
- on wife's money gift by husband, § 218.
- on purchase money of homestead, § 265.

INVALID MARRIAGES.

- discussed, §§ 10, 16.

INVESTMENT.

- of wife's funds, profits, §§ 144, 190.
- may be made by wife in person or through her agent, § 224.

ISSUE.

- of slave marriage, § 5.
- See also CHILD; CHILDREN; INCREASE; REVENUE.

JOINDER OF HUSBAND.

- generally, § 101.
- in wife's representative capacity, § 32.
- in wife's contracts and deeds for certain corporation purposes unnecessary, when §§ 77, 106.
- reason for, §§ 86, 98.
- as essential part of the wife's deed, § 100.
- when, § 101.
- separate deeds, § 101.

JOINDER OF HUSBAND—continued.

- by power of attorney to wife, § 101.
- when he is not *sui juris*, § 102.
- when he is insane, § 103.
- when he has deserted wife, § 105.
- in wife's power of attorney, § 120.
- pro forma* in wife's notes, § 228.
- in sale of homestead, § 258.
- in mechanic's lien on homestead, § 263.
- refusal of husband entitles wife to sue, when, § 282.
- in wife's application for guardianship, § 284.
- in wife's application for support from her lands, § 284.
- in wife's suits where their interests conflict, § 286.
- in wife's suits concerning community, § 287.
- in wife's suit for death of child, § 288.
- in wife's suit to recover homestead, § 290.
- in wife's suit for alienation of affections, § 291.
- in suits against wife, §§ 294, 295, 296.
- in suits against wife when he has abandoned her, § 296.

JOINDER OF WIFE.

- in husband's deed as a waiver of her claim of separate property, § 81.
- not required in conveyance of husband's separate property or the community unless homestead, §§ 115, 116, 119, 207.
- in conveyance of community unnecessary even where title stands in her name, § 207.
- in sale of homestead, §§ 117, 253, 258.
- where she is insane, § 259.
- required in mechanic's lien, § 263.
- not required in suits concerning husband's property, § 284.
- in suits for necessities not indispensable, § 294.

JOINT LUCRATIVE TITLE.

- was community at Spanish law, § 184.
- joint donation to husband and wife, separate estates, § 184.

JUDGMENT.

- decree as proof of marriage, § 12.
- correcting defective certificates, § 110.
- of court ordering property sold, as estoppel, § 132.
- estoppel by, § 139.
- lien as affecting homestead, § 266.
- against married women, generally, §§ 315-317.
- not awarding execution specifically against wife's separate property, §§ 316, 317.
- against married women for liability other than contractual, §§ 315-317.
- upon demand against wife, § 317.
- where wife recovers as sole plaintiff, § 317.

JUDGMENT—continued.

- where husband and wife recover as plaintiffs, § 317.
- default against wife, § 318.
- against wife at common law and with us contrasted, § 318.
- setting aside by appeal or error, § 318.
- collateral attack, § 319.
- void and voidable, § 319.
- binding effect, generally, §§ 139, 319.
- reviving against married women, § 319.
- of foreclosure only, § 320.
- for costs, when, § 320.
- against husband binds wife, when, §§ 37, 321.
- confession of, by wife, § 322.
- execution, § 322.
- in wife's favor in under control of husband, § 323.
- in divorce, see **DIVORCE**.
- awarding custody of child, §§ 359, 360.
- awarding alimony, § 357.
- finality of divorce decree, generally, § 361.
- against community survivor where minor children not parties, § 399.
- against community survivor generally, §§ 383, 384, 398, 399.

JURISDICTION.

- of suits for dissolution of marriage, §§ 328, 329.
- appellate, in divorce proceedings, § 329.

UNKNOWN OR MADE KNOWN.

- certificate failing to show, etc., § 108.

ABOP.

- acquisitions by, of either spouse, community, §§ 171, 184, 186, 187.
- ability to earn is not property, §§ 219, 225.
- of slaves and animals belonging to wife is community, § 187.

ACHES.

- of wife as estoppel, § 130.
- coverture as an answer to plea of, § 311.

AND CERTIFICATE AND BOUNTY WARRANTS.

- status as property, § 200.

ANDS.

- wife's contracts to buy, § 69.
 - "increase" of, is separate, § 221.
- See also **REALTY**.

ATHE.

- part of homestead, § 254.

LAW.

- governing marriage contracts, § 2.
- Roman, as to slave rights, § 5.
- Spanish, as to age, §§ 6, 7.
- ecclesiastical, § 7.
- Spanish, as to solemnization, § 8.
- Indian customs as to marriage, § 11.
- Spanish law of marital rights, §§ 22, 26.
- of wife's domicil, § 28.
- of matrimonial domicil, §§ 34, 279.
- governing prior to 1840, §§ 44, 79.
- common, and Spanish, of gifts and conveyances between spouses, § 79.
- early laws of conveyances, § 94.
- Spanish law of forced heirship, § 159.
- early divorces, § 327.

See also COMMON LAW; CONFLICT OF LAW.

LEASE.

- leasehold interest will support homestead claim, § 252.
- husband may, the homestead, § 259.

See also RENTING.

LEGAL TITLE.

- of community in husband, § 175.

LEVY.

- may be upon community for individual debts, § 204.
- upon wife's property for husband's debts, use, and hire, § 230.
- upon homestead a nullity, § 266.

LIBRARY OF FAMILY.

- exempt, § 273.

LICENSE.

- authorized, §§ 7, 10.
- to whom directed, § 10.
- return on, as evidence, § 12.

LIEN.

- statutory laborer's, on wife's property, § 124.
- against property not affected by dedication of property as homestead, §§ 259, 264, 266.
- husband may sell homestead to adjust, §§ 259, 265.
- constitutional, for improvements on homestead, § 264.
- for purchase money including interest, § 265.
- "other liens" on homestead, § 266.
- levy upon homestead creates none, § 266.
- for taxes on homestead including costs, § 267.
- foreclosure of, parties, § 294.
- foreclosing against wife. judgment, § 320.
- against property of decedent, §§ 371, 373.

WIFE ESTATE.

will support homestead rights, § 252.

WIFES IMITATIONS.

under Const. 1869, §§ 23, 308.

in favor of wife's principal, §§ 75, 312.

property acquired by, is community, § 197.

when property is acquired by, § 197.

statutes of 1879, § 308.

statutes of 1895, § 309.

statute suspending from 1861 to 1870, § 308.

tacking disabilities, §§ 308, 313.

against married women in real actions, § 309.

against married women in personal actions, § 309.

when statute starts in real actions, § 310.

when statute starts in personal actions, § 310.

cause of action must have been complete prior to coverture to start the statute, § 310.

against husband binds wife, when, § 310.

time within which married women may redeem land sold for city taxes, § 310.

run against wife's cotenant, § 310.

coverture as an exemption from statute, § 311.

coverture must be alleged and proved, § 311.

husband and wife living apart, wife's exemption, § 311.

against wife where she might sue because of husband's conflicting interests, § 311.

wife may plead, § 312.

husband cannot waive plea of, for wife, § 312.

wife's new promise, § 312.

wife's promise to pay barred debt, § 312.

marriage does not arrest, § 313.

husband pleading against wife, § 314.

children's occupancy of deceased father's estate is not "title nor color of title" against widow, § 363.

LIQUOR DEALER.

damages recoverable against, § 196.

action against, parties, § 289.

WIFE LIVING APART.

wife's support, §§ 29, 67.

implied agency of wife, when, § 67.

wife's conveyances, § 105.

wife's rights in community, §§ 177, 184.

wife's rights to homestead, §§ 177, 272.

cannot be two homesteads, § 272.

suits, §§ 286, 287, 297.

LIVING APART—continued.

husband and wife as witnesses against each other, § 305.

limitations against wife, § 311.

See also ABANDONMENT.

LOT OR LOTS IN CEMETERY.

exempt, § 273.

LOTTERY TICKET.

prize drawn by wife, community, § 190.

LUMBER.

cut from logs taken from wife's land, community, § 189.

not "increase of land," § 221.

LUNACY.

See INSANE.

MACHINERY.

affixed to homestead, § 254.

MAINTENANCE.

wife's right to, § 20.

MAJORITY.

marriage confers upon infant female, § 18.

infant male does not attain by marriage, § 102.

upon reaching his, husband may avoid his prior joinder in wife's deed,
§ 102.

MANAGEMENT.

wife's property subject to husband's, §§ 36, 37, 58, 82.

of wife's property where husband insane, § 103.

of wife's property where husband has deserted her, § 105.

See also CONTROL; USE.

MARITAL RIGHTS.

of slaves, § 5.

at common law, § 21.

under Spanish law, §§ 22, 168.

policy of our law, § 25.

MARRIAGE.

source, § 1.

as civil contract, § 1.

nature of contract, § 2.

defined, § 2.

capacity to contract, § 2.

who may contract, §§ 3, 6.

who may not contract, §§ 4, 6, 178.

void, §§ 4, 14, 178, 330.

MARRIAGE—continued.

- incestuous, § 4.
- slaves, § 5.
- solemnization, § 8.
- curative acts as to, § 8.
- who authorized to celebrate, § 9.
- invalid, §§ 9, 16.
- invalid, legitimacy of children, § 364.
- by Indian customs and forms, § 11.
- proof of, § 12.
- procured by fraud or duress, § 15.
- common law, §§ 19, 364.
- celebrated elsewhere, § 27.
- relieves infancy of female, § 18.
- does not relieve infancy of male, § 102.
- revokes power of attorney, when, § 120.
- relation ceases only, when, § 177.
- illicit relations not, §§ 178, 364.
- does not discharge existing obligations or debts, §§ 49, 203, 293.
- does not incapacitate woman from owning property, § 210.
- stipulations in contemplation of, § 274.
- as a consideration for matrimonial settlement, § 277.
- will not abate wife's suit instituted *dum sola*, §§ 285, 296.
- dissolution of relation, see DEATH; DIVORCE.
- abroad of persons prohibited here, § 339.
- abroad recognized here, § 339.

MARRIAGE SETTLEMENTS.

- marriage contract made elsewhere, § 27.
- the contract, construction, §§ 27, 276, 279.
- statute regulating, § 274.
- cannot alter the legal orders of descent, § 274.
- cannot be altered after marriage, §§ 274, 278.
- must be acknowledged and recorded, § 274.
- unrecorded, good between whom, § 275.
- where recorded, § 275.
- excluding husband from all participation, § 276.
- marriage a sufficient consideration for, discussed, § 277.
- conflict of laws, § 279.

See also CONFLICT OF LAWS.

MARRIED WOMEN.

- limitations in real actions, § 309.
- limitations in personal actions, § 309.

See also WIFE.

MECHANICS' LIENS.

- wife's, generally, § 124.

MECHANICS' LIENS—continued.

innocently acquired against wife's property, § 233.
on homestead, § 263.

See also LIEN.

MENTAL SUFFERING.

See INJURIES.

MERCHANT.

married woman as, §§ 140–146.

MILCH COWS AND THEIR CALVES.

five exempt, § 273.

MILK AND BUTTER.

of wife's cows, community § 185.

MILL.

attached to homestead, § 254.

MINERALS.

dug from wife's land, §§ 189, 221.

MINGLING PROPERTY.

of wife with community, §§ 144, 145, 221.

husband mingling his property with community, §§ 206, 354.

MINOR.

sale of intoxicating liquor to, § 196.

may contract marriage settlement, how, § 274.

See also INFANT.

MONEY.

wife's borrowing, § 69.

wife's recovering, paid on her invalid contracts, § 71.

deposits of, by husband in wife's name, § 92.

MORTGAGE.

by wife of her property as security for another, §§ 75, 123, 143.

deed may be shown to be, § 85.

by husband to secure his debt to wife, §§ 89, 93.

canceling for fraud, § 114.

of wife's property, generally, §§ 123, 234.

by wife to secure debt to be subsequently contracted, § 123.

of community does not alter its status as property, § 201.

husband may, community property, § 207.

of homestead, §§ 253, 254, 259, 262.

valid as to excess of homestead, § 262.

form of, against homestead, immaterial, § 262.

renewal against homestead, §§ 259, 262, 265.

of things affixed to the homestead, § 262.

MORTGAGE—continued.

estoppel to assert, §§ 128, 129, 262.

on homestead invalid, even though for borrowed money for improvements, §§ 263, 264.

wife may foreclose on community property, § 283.

MOVABLES.

status governed by what law, §§ 34, 279.

MUTATIONS.

of wife's property, §§ 146, 190, 231.

of community property, §§ 184, 201.

property taken in settlement of inheritance, separate, § 220.

• See also EXCHANGE.

MUTUAL WILLS.

See WILLS.

NAME.

husband's authority to sign wife's name, §§ 39, 47.

wife's, appearing on paper, § 47.

business in wife's, § 140.

change of, §§ 17, 352.

NECESSARIES.

wife may pledge husband's credit for, §§ 29, 51.

wife cannot contract with husband for, § 49.

what are, §§ 51, 54, 66.

after divorce, §§ 50, 324.

furnished wife by parent, whether husband liable, § 51.

source of husband's liability for, §§ 51, 52, 53.

for husband, § 58.

attorney's services as, § 66.

insurance, § 73.

wife's estate liable for her contracts for, § 234.

husband and wife may be sued for, § 294.

allegations in suit against wife for, § 300.

renewal of debt as, § 312.

promise to pay barred debt, not, § 312.

pending divorce, § 357.

NEGLIGENCE.

of husband imputable to wife, when, § 287.

NEXT FRIEND.

wife may sue without, §§ 281, 283.

NONRESIDENT.

husband and wife, § 208.

NOTES.

- wife's, not transferable by husband, §§ 37, 39, 151.
- presumption of community, when, §§ 39, 62.
- innocent purchaser of wife's, § 49.
- wife's, not transferable without husband's consent, § 62.
- wife giving, for purchase of land, §§ 69, 70.
- husband's, to wife, § 88.
- husband hiring wife to live with him, note for such debt, § 91.
- husband's, promising interest to his wife, § 218.
- for wife's property, § 225.
- husband signing wife's, *pro forma*, § 228.
- from man to woman in consideration of marriage, enforceable, § 274.
- wife suing husband on, § 283.
- husband enjoining another's collection of wife's, § 286.
- wife proper defendant in action on, when, § 294.

NOTICE.

- to husband as affecting wife, § 35.
- to purchasers of wife's title to her notes, §§ 39, 151.
- rule of, applicable to husband and wife as agent and principal, § 42.
- registration of defective deed, § 109.
- persons having, of defects in wife's conveyance, § 113.
- from grossly inadequate consideration, § 114.
- all persons held to, of married woman's want of capacity, § 131.
- by purchaser of fraud of husband, § 147.
- deed taken in wife's name is not, of any equities in her favor, §§ 180, 181.
- by registration of schedule of wife's property, § 212.
- what recitals in deed will amount to, of wife's equities, §§ 240, 241, 392.
- record of defective marriage contract, none, § 274.
- unrecorded marriage contract valid as to those having, § 275.
- to husband by citation of suits against wife, § 296.
- of want of survivor's power to sell, § 395.
- everyone has, of the law of descent, etc., § 395.
- recitals in title as, of equities of children, § 395.
- burden of proof to show, of equity, § 395.

OBEDIENCE.

- duty of wife, § 20.

OCCUPANCY.

- actual, not required of homestead, § 247.

OFFICER.

- authorized to celebrate rites of matrimony, § 9.
- acts beyond jurisdiction, §§ 9, 10.
- illegally celebrating rites of matrimony, § 10.
- constitutional qualifications, § 33.

FFICER—continued.

women as, § 33.

married woman as, in certain corporations, § 77.

same, not required to take both husband's and wife's acknowledgment to deed, § 101.

duty of, in taking wife's acknowledgment, §§ 107, 108.

no power to certify unless wife appeared before him for the purpose of acknowledging, §§ 107, 112.

in taking acknowledgment must act within his own jurisdiction, § 108.

seal to certificate of acknowledgment, § 109.

correcting certificate, §§ 109, 110.

what, authorized to certify acknowledgment, § 111.

de facto, § 111.

disqualified to take acknowledgment, when, § 111.

failure to properly take acknowledgment, whether deed may be avoided, § 113.

county judge to appoint guardian of insane or habitual drunkard husband or wife, when, § 166.

FFSPRING.

of wife's animals is "increase" and community, § 185.

RAL PARTITION.

of wife's land, § 64.

RCHARDS.

as part of homestead, § 249.

RDER OF DESCENT.

cannot be altered by contract between husband and wife, §§ 49, 274, 276, 278, 372.

comment on rule, § 278.

WNED OR CLAIMED BEFORE MARRIAGE.

property, is separate, §§ 214, 215, 225.

ARAPHERNAL.

property, §§ 22, 169.

property might be alienated, § 94.

ARENT AND CHILD.

consent of parents, §§ 6, 7.

parent furnishing "necessaries" to married daughter, § 51.

written consent of parent, when, §§ 102, 274.

guardianship, § 165.

support, § 167.

parent may sue on liquor dealer's bond for sale to minor child, § 196.

action by parent for death of child, § 288.

liability of parent not affected by order of court in divorce, § 359.

ARTITION.

- deed of, may estop married women, § 136.
- may be had after divorce, § 354.
- of estate, generally, § 364.
- of homestead, §§ 365, 371, 373, 381.
- of allowance in lieu of homestead, § 365.
- of proceeds of insurance on homestead, § 365.
- of estate where children's rights have never been determined, § 374.
- of community from estate of deceased; statute, § 391.

See also ORAL PARTITION.

ARTNER.

- wife as. in mercantile business, §§ 141, 142, 300.
- suing wife as, § 300.

AYMENT.

- recovery back by married woman upon rescinding her contract, § 71.

ENDING SUITS.

- marriage of *feme sole* plaintiff, § 285.
- death of husband plaintiff. §§ 286, 398.
- divorce, conveyances, § 340.

ENTENTIARY.

- confinement of husband in, §§ 105, 292, 296, 337.
- property does not descend and vest, upon confinement in, § 363.

ENSION MONEY.

- is separate property, § 200.

ERMISSION.

- of court to sue, § 281.

ERSONAL.

- liability of wife discussed, §§ 46, 47, 56, 57, 59, 60, 66, 70, 75.
- P**roperty of wife, her conveyance to husband, § 87.
- P**roperty of wife, her conveyance, generally, § 118.
- P**roperty of wife, where registered, § 211.
- P**roperty owned by wife before marriage, save slaves, formerly became community, § 215.
- E**arnings of wife, §§ 184, 186, 203, 218, 219.

ICAL INABILITY.**IMPOTENCE; INFANCY.**

PLATTING HOMESTEAD.

into lots, streets, etc., §§ 249, 250.

PLAY.

See **EARNINGS.**

PLEADINGS.

wife must allege her authority to sue alone. § 298.

of wife, amendable, § 298.

in wife's suit to recover her property pleading should show such to be separate property, § 298.

wife must show the abandonment, § 298.

wife must allege capacity to sue for community, § 298.

allegations of conflicting interests of husband and wife, § 298.

not amiss to crave permission of court for wife to sue, § 298.

of husband in actions in behalf of wife. § 299.

allegata and *probata*, § 299.

of husband in actions for community, § 299.

wife's liability must be alleged, § 300.

of plaintiff showing defendant sued as a partner to be married woman, § 300.

of plaintiff where no money demand is sought against married woman, § 300.

should show reasons for not joining husband as a defendant, § 300.

coverture should be pleaded as defense. § 301.

of coverture too late after judgment. § 301.

coverture as exemption from limitation must be alleged, § 311.

in divorce suit, see DIVORCE.

petition in action against survivor, §§ 384, 399.

survivor must assert her exemptions, when sued, when, § 399.

POLICY OF OUR LAWS.

discussed, §§ 25, 83.

invalid or irregular marriage, §§ 8, 19, 178.

as to contracts between husband and wife. §§ 49, 278.

suits between husband and wife. §§ 155, 283.

as to marriage relation, § 171.

as to estates of the parties to marital union, § 184.

with respect to the marital estates, §§ 210, 214.

with respect to wife's litigation, §§ 280, 286.

with respect to acts of survivor in community, § 385.

PORTRAITS AND PICTURES.

of family exempt, § 273.

POSSESSION.

of wife's property by husband, presumptions, §§ 40, 134, 232.

husband entitled to, of wife's property, §§ 36, 37, 58, 82.

of husband is wife's, § 82.

of wife, insufficient to rebut presumption of community, § 232.

POSTNUPTIAL.

- contracts. §§ 49, 172, 372.
- gifts and conveyances, §§ 79-81, 83, 172.
- marriage settlement cannot be altered by, § 278.

POWER OF ATTORNEY.

- generally, § 120.
- wife's, to husband, §§ 41, 101, 207.
- of husband to wife to make deed, discussed, § 101.
- wife's, to sell homestead, § 258.

PRACTICE.

- wife held to same diligence, rules, etc., as others, §§ 280, 281, 294, 322.
- marriage of *feme sole* plaintiff, §§ 285, 296.
- dismissing as to husband, § 296.
- in divorce cases, see DIVORCE.

PRE-EMPTION HOMESTEAD.

- is community property, § 199.
- when title complete, § 199.

REFERENCE.

- of wife by husband over other creditors, §§ 90, 93.

PREMIUM.

- See INSURANCE.

PREPARATION.

- to occupy homestead, § 247.

PRESENCE OF HUSBAND.

- at examination of wife, § 107.

PRESUMPTIONS.

- of marriage, discussed, § 13.
- that officer has done his duty, §§ 13, 112.
- of foreign law, § 34.
- none that husband is wife's agent, § 35.
- of community character of wife's notes, § 39.
- wife's name appearing on paper, §§ 47, 297.
- from husband's making deed to wife, § 82.
- of delivery of title papers from husband to wife, § 82.
- of community character of property, when, §§ 146, 179-181, 183, 201, 232, 326.
- of fair dealing between husband and wife, § 147.
- where conveyance is to wife, §§ 180, 181, 232.
- of community may be overcome, §§ 182, 232, 326.
- of community, insufficient proof to overcome, instances, § 183.
- of separate estate where deed made to wife after husband's death, § 183.
- on termination of community, §§ 184, 326, 354, 395.

PRESUMPTIONS—continued.

- of community as affected by record of wife's schedule, § 212.
- wife cannot maintain such possession as will rebut the, of community, § 232.
- wife's property in husband's name, § 233.
- that payment by wife was from community funds, § 240.
- of intention of parties to written instrument, § 242.
- against inequitable matrimonial agreement, § 277.
- of falsity of charges of unchastity against wife, § 341.
- in divorce proceedings, § 344.
- of authority of survivor in community to sell, §§ 392, 393.

PRINCIPAL AND SURETY.

See SURETY.

PRIVY EXAMINATION.

- of wife, discussed, §§ 74, 107.
- prescribed in 1841, § 95.
- under act of 1846, § 96.
- purpose of, §§ 98, 121.
- as essential part of wife's deed, §§ 100, 107.
- presence of husband, § 107.
- certificate should show, § 108.

PROBATE HOMESTEAD.

- discussed, §§ 159, 373.

PROFITS.

- of wife's investment, §§ 140, 142, 144, 190, 205.
- of husband's or community investments, § 195.

PROOF.

- of marriage, §§ 11, 12.
- of foreign law, § 34.
- to establish agency of husband for wife, § 35.
- of acknowledgments, how supplied, § 108.

PROPERTY.

- rights where marriage invalid, § 16.
- in common-law marriages, § 19.
- rights at common law, § 21.
- rights at Spanish law, §§ 22, 168.
- rights defined by constitution, § 23.
- rights in property acquired in another state, § 27.
- rights in property acquired while *en route* to this state, § 27.
- married woman's right to own, § 79.
- division of, between husband and wife upon separation, § 91.
- embraced in statute of conveyances, §§ 95-97.
- status of, not affected by agreements, when, §§ 144, 172, 218, 278.

PROPERTY—continued.

- status of, not affected by subsequent legislative act, § 173.
- status determined by origin of title, and not time of receiving formal deed, §§ 184, 200, 215, 224.
- acquired in another state, status, § 208.
- “owned or claimed before marriage” is separate, §§ 214, 215.
- ability to earn is not, § 219.
- wife’s homestead rights are not, § 259.
- affected by marriage contract, § 275.
- marriage contracts where recorded, § 275.
- wife may sue to recover her, § 282.

PROVISIONS AND FORAGE.

- exempt, § 273.

PUBLIC OFFICE.

- right of women to hold, § 33.

PURCHASE MONEY.

- wife’s liability for, discussed, § 70.
- wife receiving, creates no estoppel, § 131.
- wife foreclosing for, does create estoppel, § 139.
- returning, by wife, § 152.
- husband may sell homestead to pay, § 259.
- for homestead, discussed, § 265.
- includes interest, § 265.
- wife proper defendant in action for, when, 294.

RAILWAY COMPANIES.

- right of way across wife’s land conveyed by husband, § 37.
- refusing to redeem tickets; damages, § 196.
- husband may grant right of way across homestead, when, § 260.
- actions for penalty for refusing to redeem tickets; parties, § 289.

RATIFICATION.

- of marriage procured by fraud or duress, § 15.
- by husband of wife’s invalid contracts, § 37.
- by wife of husband’s disposition of her property, §§ 42, 130, 152.
- as affecting wife’s right to rescind, § 72.

REALTY.

- husband no authority to alienate wife’s, § 37.
- registration of wife’s, where made, § 211.
- “divesting title” in divorce, § 336.

RECEIVER.

- of insane person’s estate, when, § 166.
- of community estate, § 399.

RECONCILIATION.

of husband and wife; property rights, § 91.

RECORDING.

of wife's invalid deed no notice, when, §§ 87, 109, 112.

of wife's deed where defective as to husband, § 103.

wife's brand; presumption, §§ 180, 232.

of wife's muniments of title, §§ 213, 275.

homestead designation, § 257.

marriage contract, §§ 274, 275.

RECRIMINATION.

See DIVORCE.

REGISTRATION.

of wife's separate property, §§ 211, 212, 275.

REIMBURSEMENT.

by husband of community, § 176.

of community from separate estate, when, §§ 205, 228.

of separate estate from community, § 206.

community not entitled to, for husband's services in caring for wife's property, § 234.

REMARRIAGE OF WIDOW.

§§ 375, 387, 400.

RENT.

of wife's property, community, §§ 188, 205.

due or owing at marriage may be separate property, § 215.

rents and profits of lands devised to wife, community, § 220.

and profits from trust estate, § 225.

of wife's land when separate, §§ 226, 230, 237.

of homestead, § 255.

RENTAL PROPERTY.

not homestead, § 249.

RENTING.

homestead, §§ 249, 255.

not an abandonment, when, § 270.

REPAIRS.

to wife's separate property, § 60.

to wife's property, lien, § 124.

REPRESENTATIVE CAPACITIES.

married woman as agent, trustee, etc., § 32.

wife's bonds in, §§ 76, 164.

executrix or administratrix, § 76.

guardian, §§ 32, 164.

REPUTATION.

- as proof of marriage, § 12.
- husband slandering wife, § 155.

RESCISSION.

- of contract by married women, § 71.
- by wife, returning benefits, § 72.

RESPONDEAT SUPERIOR.

- doctrine of, § 154.

RESULTING TRUSTS.

- discussed, § 239.
- parol evidence admissible to show, §§ 216, 241.
- in favor of wife where conveyance taken in husband's name, § 228.
- wife's rights in, not subject to the registration laws, § 239.
- not the result of contract, § 239.
- parol evidence, § 241.
- quantum* of proof to show, § 242.

RETRACT.

- certificate of officer should show that wife did not wish to, § 108.
- when wife's right to, is exhausted, §§ 121, 122, 261.

REVENUES.

- of wife's property are community, § 205.
- of wife's property liable for her support, §§ 59, 118.
- of trust estate, when separate, §§ 225, 237.

REVOCATION.

- of agency, §§ 35, 120.
- of will, § 163.

ROADS AND STREETS.

- across homestead, § 260.

ROCK.

- quarried from wife's land, §§ 189, 221.

RURAL HOMESTEAD.

- defined, § 243.
- may embrace separate tracts, § 249.
- what is, § 250.
- extent of, § 251.
- improvements on, § 251.
- value under early law, § 251.
- business homestead, § 253.
- cannot combine with urban, § 253.

See also HOMESTEAD.

SADDLES, BRIDLES, AND HARNESS.

exempt, § 273.

SALE.

of wife's property by husband, §§ 37, 152.

of homestead by husband, § 117.

wife no power to make, of her interest in community, § 174.

of community by husband, § 207.

of exempt property not fraudulent, § 217.

of wife's property restrained, when, §§ 233, 282.

of homestead and purchase of another as intention to dedicate new homestead, § 247.

of business homestead, § 253.

of homestead, generally, § 258.

of homestead by husband, when, §§ 259, 265.

"pretended" of homestead, § 262.

of homestead for taxes may include costs, § 267.

proceeds of, of homestead exempt, when, § 268.

of community at foreclosure to pay wife's debt, § 283.

by survivor, §§ 378, 381, 384, 387, 390, 392-394, 397.

See also GIFTS AND CONVEYANCES BETWEEN HUSBAND AND WIFE.

SAND.

See STONE.

SCHEDULE.

of wife's separate property, § 211.

SEAL.

as essential part of wife's deed. §§ 100, 108, 109.

SEPARATE ACKNOWLEDGMENT.

form prescribed in act of 1841, § 95.

under act of 1846, § 96.

under act of 1879, present statute, § 97.

a "receipt" held to require, § 101.

time of taking, discussed, § 101.

separate deeds as, § 101.

statute no application to what conveyances of wife, §§ 115, 116, 118.

to conveyances of personal property, § 118.

of wife's power of attorney, § 120.

liens for improvements upon homestead, §§ 124, 263, 264.

wife insane, §§ 259, 272, 375.

See also ACKNOWLEDGMENTS.

SEPARATE PROPERTY OF WIFE.

of wife under Spanish law, § 22.

constitutional provision, § 23.

SEPARATE PROPERTY OF WIFE—continued.

not liable to husband for support of wife, §§ 29, 210.

control of, when husband has abandoned wife or is insane, §§ 31, 103, 167.

husband's right to control, §§ 36, 37, 58, 205, 321, 323.

husband no power to charge or convey, §§ 37, 39, 58, 59, 82, 151, 210.

husband's contracts for benefit of, §§ 37, 59, 60, 234.

liable when, §§ 59, 69, 234.

wife's contracts concerning, § 60.

what are "expenses for benefit" of, § 60.

purchases on credit, when, §§ 69, 216, 218, 228.

mortgages, § 75.

its dedication to public use, § 78.

husband's declarations concerning, § 85.

under her control when husband insane, §§ 31, 103, 167.

conveyances of, § 115.

wife's power of attorney to convey, § 120.

her bonds for title to, §§ 121, 122.

her mortgage, generally, § 123.

liens for repairs or improvements, § 124.

her purchases on credit, when, § 142.

borrowed money, when, §§ 143, 184, 228.

burden of proof as to, §§ 145, 146, 182.

mutations of, §§ 146, 223, 231.

whether liable to reimburse husband where he has paid for her tort, § 153.

may be willed, § 159.

conveyance of, to wife, may negative community presumption, § 180.

increase of, is community, § 185.

rents and hire of, is community, § 188.

crops grown upon land the, are community, § 187.

interest, when, § 191.

damages for tort, when, § 193.

damages recovered on liquor dealer's bond, when, §§ 196, 289.

wife's interest in community is not, §§ 174, 203.

improvements of, from community, § 205.

not equitably chargeable with expense of managing by husband, § 205.

entitled to be reimbursed, when, § 206.

defined, § 209.

wife's right to hold, generally, § 210.

registration of, § 211.

not lost by failure to register, § 212.

not lost by failure to record her muniments of title, § 213.

what is, generally, § 214.

"owned or claimed before marriage" is, § 215.

community of a former marriage, § 215.

rents, hire, and the like may be, when, §§ 215, 220.

property acquired by gift, § 216.

SEPARATION DEEDS.

discussed, § 91.

SEQUESTRATION.

by wife, § 76.

SERVICES.

of wife, § 32.

See also **EARNINGS; LABOR.**

SEW.

See **EARNINGS.**

SHEEP.

twenty head exempt, § 273.

SILENCE.

by wife as estoppel, §§ 37, 130, 213.

SIMULATED SALE OF HOMESTEAD.

§ 262.

SLANDER.

wife may be sued for, § 154.

of wife by husband; wife as a witness, § 305.

SLAVES.

marriage of, § 5.

"increase of," as separate property, §§ 209, 222.

SOIL, ETC.,

taken from wife's land, § 189.

SOLE AND SEPARATE USE.

in deed from husband to wife unnecessary, § 82.

in deed to wife, presumption, §§ 180, 182.

words not equivalent to, § 183.

SOLEMNIZATION.

of marriage, §§ 8, 13, 19.

abroad, § 27.

SPANISH LAW.

See **LAW.**

SPECIFIC PERFORMANCE.

of wife's contract, § 74.

of title bonds, §§ 121, 122, 261, 304.

SPECULATION.

See **PROFITS**.

STALE DEMAND.

coverture as an exemption from plea of, § 311.

tacking disabilities, § 313.

See also **LIMITATIONS**.

STATION IN LIFE.

as affecting wife's contract for necessities, §§ 54, 73.

STATUS.

of husband and wife, §§ 1, 327.

of parties, by what law governed, § 34.

of wife at common law, § 79.

of property not affected by mere agreements of parties, §§ 144, 172, 218, 278, 372.

of property not affected by subsequent legislative act, § 173.

of property is determined by time right accrued, §§ 184, 215, 224.

of property acquired in another state, § 208.

of parties as affected by divorce, § 327.

STATUTE.

of "sixteen" and "fourteen" years, § 4.

intermarriages of whites and blacks, § 4.

bigamy, § 4.

incestuous marriage, § 4.

validating certain slave marriages, § 5.

age of consent, § 6.

marriage license, §§ 7, 10.

validating certain marriages, § 8.

who may celebrate rites of matrimony, § 9.

punishing for illegal celebration, § 10.

proof of marriage, § 12.

presumption of death, § 13.

change of name, §§ 17, 352.

marriage of infant female, § 18.

adopting common law, § 24.

marriages celebrated elsewhere, § 27.

wife's rights to support from her lands, §§ 29, 226, 284.

guardianship of insane husband or wife, §§ 31, 103, 166.

husband's control of wife's separate property, § 36.

wife's contracts, §§ 45, 56, 60.

of conveyances, discussed, § 74.

wife's bail, §§ 76, 156.

wife's bond as executrix or administratrix, §§ 76, 164.

when surviving husband or wife under twenty-one years, §§ 76, 366.

wife's contracts and deeds for certain corporation purpose, § 77.

TATUTE—continued.

- of conveyances, 1841, § 95.
- of conveyances, 1846, § 96.
- of conveyances, 1870, present statute, §§ 97, 109.
- infant's contracting marriage settlements, § 102.
- descent of community property where one of spouses insane, § 104.
- correcting defective certificates, § 110.
- who authorized to certify acknowledgments, § 111.
- laborer's lien, § 124.
- mechanic's lien, §§ 124, 263.
- fraudulent conveyances, § 148.
- crimes of married women, § 156.
- wills, § 158.
- declaring certain instruments to pass the title in fee simple, § 160.
- "children" in wills, § 160.
- manner of revoking will, § 163.
- birth of child as revoking will, § 163.
- married woman as guardian, § 164.
- rights of parents to guardianship of child, § 165.
- receiver of insane's estate, when, § 166.
- support of insane, §§ 166, 167, 234.
- defining community property, §§ 169, 170.
- damages recoverable against liquor dealer, §§ 196, 289.
- penalty against railroad companies, §§ 196, 289.
- community property liable for community debts, § 202.
- defining wife's separate estate, § 209.
- registration of wife's separate estate, § 211.
- defining and exempting homestead, § 244.
- designating homestead, § 257.
- exempting proceeds of sale of homestead, § 268.
- marriage settlements, § 274.
- unrecorded marriage contract good between parties, etc., § 275.
- wife may sue for recovery of separate property, § 284.
- wife's suits instituted *dum sola*, § 285.
- husband may sue for recovery of wife's separate property, § 286.
- personal injuries resulting in death, action for, § 288.
- venue of suits against married women, § 293.
- confidential communications, § 303.
- excluding evidence of transactions with deceased, § 304.
- husband and wife as witnesses for or against each other, § 305.
- limitations not applicable to married women, etc., §§ 308, 309.
- suspending laws of limitation from 1861 to 1870, § 308.
- exemption from limitations of married woman in redeeming land sold
for city taxes, § 310.
- early exemption from statute of limitations, § 311.
- against tacking disabilities, § 313.
- execution against wife, §§ 315, 323.
- judgment in demands against wife, §§ 317, 323.

STATUTE—continued.

- presumption as to property upon dissolution of marriage, § 323.
- early divorce laws, § 327.
- present divorce laws, § 328.
- adultery as ground for divorce, § 336.
- recrimination in adultery, § 336.
- conveyance pending divorce suits, § 340.
- wife may require inventory and injunction in divorce case, § 340.
- in divorce, court may make orders respecting parties and property, § 340.
- answer in divorce cases, § 343.
- quantum* of proof required in divorce, § 347.
- parties to divorce suits may testify, § 349.
- children not made illegitimate by divorce, § 352.
- either party to divorce may marry again, § 352.
- court may change name of party to divorce, § 352.
- decree of divorce, § 352.
- decree of divorce may settle property rights of parties, § 353.
- forbidding divestiture of title to real estate in divorce, § 356.
- allowing alimony, § 357.
- costs in divorce, § 358.
- custody of children, § 359.
- descent of property, § 363.
- death of adopted heir, descent of property, § 363.
- descent of community property, § 364.
- community descends charged with debts, § 364.
- children born before marriage inherit, § 364.
- descent of homestead, § 365.
- partition of homestead, § 365.
- homestead rights same whether separate or community property, § 365.
- administration, §§ 366, 381.
- survivor may renounce right to administration, § 366.
- revoking letters in favor of one having preference, § 366.
- allowance for support of widow and minor children, § 367.
- setting apart homestead and other exemptions and allowances in lieu, § 371.
- administration of community, § 375.
- administrator not entitled to exemptions, § 381.
- homestead liable for certain debts, §§ 371, 373, 382.
- remarriage of widow, §§ 375, 387, 400.
- partition of community from separate estate of deceased, § 391.

STATUTE OF FRAUDS.

- parol evidence admissible to establish resulting trusts, § 241.
- contract to marry, § 2.
- release by heir, § 63.
- partition of law, § 63.
- agreements concerning boundaries, § 65.

TATUTE OF FRAUDS—continued.

dedication of wife's land, § 78.

wife's conveyance of personal property, § 118.

wife's parol agreement to sell homestead, § 261.

See also WRITING.

TEALING.

wife's property by husband, § 38.

TQCKHOLDER.

wife as, § 77.

TOCKS.

certificates, see NOTES.

TONE.

from wife's land, §§ 189, 221.

TORHOUSE.

homestead, when, § 253.

UBROGATION.

wife's right to, § 75.

of one furnishing money to discharge lien on homestead, § 265.

UFFRAGE.

women not entitled to, § 33.

UITS.

by guardian of insane husband, §§ 31, 292.

husband can make no agreement in, concerning wife's property or homestead, §§ 37, 280, 322.

against husband to recover wife's counsel fees, § 66.

to correct defective certificate, § 110.

whether permitted to impeach certificate, § 113.

of wife at common law, §§ 153, 291.

wife may make compromise, §§ 63, 280, 322.

by and against married women generally, §§ 280, 283.

wife may appear in her individual capacity in, §§ 281, 293.

wife's, against husband, §§ 283, 284.

wife as a plaintiff generally, § 284.

to recover wife's separate property, §§ 284, 325.

wife's, where husband abandons her, § 284.

wife improper party with husband in his suits, § 284.

instituted by wife *dum sola* not abated by marriage, §§ 285, 296.

not abated by death of husband, when, § 286.

parties, where husband and wife live apart, § 286.

for recovery of community property, §§ 287, 321.

by wife concerning community property, §§ 287-298.

SUITS—continued.

- husband manages the community, § 287.
- parties to, in action for damages for death of child, § 288.
- parties to, in action against liquor dealer, § 289.
- parties to, in action against railway companies for penalty, § 289.
- concerning the homestead, parties, §§ 290, 295, 321.
- husband's, in behalf of wife, binds her, §§ 286, 290, 321.
- by wife for alienation of husband's affections, § 291.
- wife's, when husband insane, § 292.
- by guardian of insane husband, § 292.
- by husband where wife insane, § 292.
- husband where he is a minor, § 292.
- wife as defendant, generally, § 293.
- husband cannot defend wife's, §§ 293, 321.
- citation to wife, service of, § 293.
- against wife, venue, §§ 293, 296.
- against husband and wife jointly, when, §§ 294, 296.
- dismissing as to husband, § 296.
- against wife where husband absent, § 296.
- on contract signed by wife, parties, § 297.
- against husband, wife unnecessary party, § 297.
- by wife, her pleadings, § 298.
- by husband for wife, his pleadings, § 299.
- against wife, her liability must be alleged, § 300.
- limitations, see LIMITATIONS.
- concerning wife's separate property, limitations discussed, § 311.
- judgments against married women, §§ 315-317.
- judgment where wife as sole plaintiff recovers, § 317.
- judgment where husband and wife recover, § 317.
- foreclosure against wife, judgment, § 320.
- costs, § 320.
- execution, § 323.
- divorce, effect of, on pending, § 325.
- death of husband pending, § 325.
- by survivor, §§ 325, 383, 398.
- for divorce, see DIVORCE.
- for partition between divorced couple, § 354.
- for exemptions and allowances, in district court, § 374.
- against qualified survivor, §§ 375, 383.
- by survivor in community, § 383.
- against survivor, no administration, § 398.
- suing surviving husband, on deceased wife's debt, § 398.
- minor children as parties to, by survivor, § 399.
- remarriage of widow, § 400.

See also ACTIONS; PARTIES; PLEADINGS.

SUPPORT.

- husband must, wife, §§ 29, 51.
- statute, §§ 29, 226, 284.

SUPPORT—continued.

- wife may forfeit right of, § 29.
- wife not liable for, of husband, §§ 58, 357.
- of family, when husband insane, §§ 103, 166.
- where husband has abandoned wife, § 105.
- of insane spouse, §§ 166, 167, 234.
- of child by parent, § 167.
- increase and fruits of wife's separate property liable for, of family, § 210.
- separate property liable for, of insane consort, § 234.
- wife cannot sue husband for, § 283.
- alimony, § 357.
- allowance for, of widow, etc., statute, § 367.

SURETY.

- wife as, §§ 75, 123.
- released, when, §§ 75, 312.
- extension to wife's principal, § 75.
- on bonds, § 76.
- husband not liable as wife's, unless, § 76.
- right to exhaust property of principal, § 75.

SURVIVOR.

- rights in the homestead not affected by will, § 159.
- may not testify as to transactions with deceased, when, § 304.
- rights as heir of deceased consort, § 363.
- rights in homestead, §§ 365, 371, 373, 379, 381.
- abandoning homestead, §§ 365, 371, 373, 374, 381.
- under twenty-one years, §§ 76, 366.
- may renounce right to administer, § 366.
- rights of, not defeated by act of deceased, § 372.
- may waive her rights, §§ 372, 373.
- cannot sell interest of children in the exemptions and allowances, § 372.
- converting children's portion of exemptions, § 372.
- and other beneficiaries not chargeable with use of exemptions, § 373.
- owning homestead, § 373.
- may have forfeited rights, §§ 374, 381.
- may establish rights in district court, when, § 374.
- powers of, when qualified, §§ 375-378, 380.
- account of, with community estate, §§ 375, 378, 387.
- to pay debts, etc., §§ 375, 377.
- compelling exhibit by, §§ 375, 383.
- citation to, on debt, when, §§ 375, 383.
- suing on bond of, §§ 375, 383, 384.
- if wife, same rights as husband, §§ 375, 381.
- remarriage of widow, §§ 375, 387, 400.
- nature of holding, §§ 376, 381.
- may contract concerning estate, when, § 376.
- M. W.—36.

SEPARATE PROPERTY OF WIFE—continued.

- title in name of husband, real status may be shown, § 216.
- gifts from the husband, § 217.
- her homestead rights not separate property, § 217.
- gifts by husband of future acquisitions, § 218.
- interest on her money, when, § 218.
- personal earnings, when, § 219.
- acquired by devise or descent, § 220.
- "increase of lands," § 221.
- increase of slaves under early laws, § 222.
- proceeds of sale of, § 223.
- property taken in discharge of debt due wife is, § 224.
- rents and revenues from trust estate, §§ 225, 237, 238.
- may be conveyed in trust for wife, § 225.
- proceeds of her land adjudged for her support are, § 226.
- life insurance policy in her favor, §§ 160, 227.
- damages to, § 229.
- value of use and hire of, when unlawfully detained by another, § 230.
- innocent purchasers of, § 233.
- liability and charges against, § 234.
- resulting trusts, § 239.
- wife may sue husband concerning, § 283.
- wife may sue to recover, §§ 282, 284, 325.
- husband may sue to recover, §§ 284, 286, 325.
- whether damages for death of child are, § 288.
- whether damages for alienating husband's affections are, § 291.
- wife's suits concerning, where husband insane, § 292.
- husband and wife jointly sued concerning, when, § 294.
- if, to be charged, wife necessary defendant, § 294.
- wife's suit to recover, pleadings, § 298.
- husband's suits to recover, pleadings, § 299.
- husband cannot revive barred claim against, § 312.
- whether liable to levy under general judgment against wife, §§ 315-317, 323.
- judgment against husband concerning, binds wife, when, § 321.
- disposition on divorce, § 353.
- descent of, 363.

SEPARATE TRACTS.

- of land in homestead, § 249.
- business homestead, § 253.

SEPARATION.

- not dissolution of marital relation, § 324.
- is not abandonment, § 335.
- when justifiable, § 338.

SEPARATION DEEDS.

discussed, § 91.

SEQUESTRATION.

by wife, § 76.

SERVICES.

of wife, § 32.

See also EARNINGS; LABOR.

SEW.

See EARNINGS.

SHEEP.

twenty head exempt, § 273.

SILENCE.

by wife as estoppel, §§ 37, 130, 213.

SIMULATED SALE OF HOMESTEAD.

§ 262.

SLANDER.

wife may be sued for, § 154.

of wife by husband; wife as a witness, § 305.

SLAVES.

marriage of, § 5.

"increase of," as separate property, §§ 209, 222.

SOIL, ETC.,

taken from wife's land, § 189.

SOLE AND SEPARATE USE.

in deed from husband to wife unnecessary, § 82.

in deed to wife, presumption, §§ 180, 182.

words not equivalent to, § 183.

SOLEMNIZATION.

of marriage, §§ 8, 13, 19.

abroad, § 27.

SPANISH LAW.

See LAW.

SPECIFIC PERFORMANCE.

of wife's contract, § 74.

of title bonds, §§ 121, 122, 261, 304.

SPECULATION.

See PROFITS.

STALE DEMAND.

coverture as an exemption from plea of, § 311.

tacking disabilities, § 313.

See also LIMITATIONS.

STATION IN LIFE.

as affecting wife's contract for necessities, §§ 54, 73.

STATUS.

of husband and wife, §§ 1, 327.

of parties, by what law governed, § 34.

of wife at common law, § 79.

of property not affected by mere agreements of parties, §§ 144, 172, 218, 278, 372.

of property not affected by subsequent legislative act, § 173.

of property is determined by time right accrued, §§ 184, 215, 224.

of property acquired in another state, § 208.

of parties as affected by divorce, § 327.

STATUTE.

of "sixteen" and "fourteen" years, § 4.

intermarriages of whites and blacks, § 4.

bigamy, § 4.

incestuous marriage, § 4.

validating certain slave marriages, § 5.

age of consent, § 6.

marriage license, §§ 7, 10.

validating certain marriages, § 8.

who may celebrate rites of matrimony, § 9.

punishing for illegal celebration, § 10.

proof of marriage, § 12.

presumption of death, § 13.

change of name, §§ 17, 352.

marriage of infant female, § 18.

adopting common law, § 24.

marriages celebrated elsewhere, § 27.

wife's rights to support from her lands, §§ 29, 226, 284.

guardianship of insane husband or wife, §§ 31, 103, 166.

husband's control of wife's separate property, § 36.

wife's contracts, §§ 45, 56, 60.

of conveyances, discussed, § 74.

wife's bail, §§ 76, 156.

wife's bond as executrix or administratrix, §§ 76, 164.

when surviving husband or wife under twenty-one years, §§ 76, 366.

wife's contracts and deeds for certain corporation purpose, § 77.

STATUTE—continued.

- of conveyances, 1841, § 95.
- of conveyances, 1846, § 96.
- of conveyances, 1870, present statute, §§ 97, 109.
- infant's contracting marriage settlements, § 102.
- descent of community property where one of spouses insane, § 104.
- correcting defective certificates, § 110.
- who authorized to certify acknowledgments, § 111.
- laborer's lien, § 124.
- mechanic's lien, §§ 124, 263.
- fraudulent conveyances, § 148.
- crimes of married women, § 156.
- wills, § 158.
- declaring certain instruments to pass the title in fee simple, § 160.
- "children" in wills, § 160.
- manner of revoking will, § 163.
- birth of child as revoking will, § 163.
- married woman as guardian, § 164.
- rights of parents to guardianship of child, § 165.
- receiver of insane's estate, when, § 166.
- support of insane, §§ 166, 167, 234.
- defining community property, §§ 169, 170.
- damages recoverable against liquor dealer, §§ 196, 289.
- penalty against railroad companies, §§ 196, 289.
- community property liable for community debts, § 202.
- defining wife's separate estate, § 209.
- registration of wife's separate estate, § 211.
- defining and exempting homestead, § 244.
- designating homestead, § 257.
- exempting proceeds of sale of homestead, § 268.
- marriage settlements, § 274.
- unrecorded marriage contract good between parties, etc., § 275.
- wife may sue for recovery of separate property, § 284.
- wife's suits instituted *dum sola*, § 285.
- husband may sue for recovery of wife's separate property, § 286.
- personal injuries resulting in death, action for, § 288.
- venue of suits against married women, § 293.
- confidential communications, § 303.
- excluding evidence of transactions with deceased, § 304.
- husband and wife as witnesses for or against each other, § 305.
- limitations not applicable to married women, etc., §§ 308, 309.
- suspending laws of limitation from 1861 to 1870, § 308.
- exemption from limitations of married woman in redeeming land sold
for city taxes, § 310.
- early exemption from statute of limitations, § 311.
- against tacking disabilities, § 313.
- execution against wife, §§ 315, 323.
- judgment in demands against wife, §§ 317, 323.

STATUTE—continued.

- presumption as to property upon dissolution of marriage, § 323.
- early divorce laws, § 327.
- present divorce laws, § 328.
- adultery as ground for divorce, § 336.
- recrimination in adultery, § 336.
- conveyance pending divorce suits, § 340.
- wife may require inventory and injunction in divorce case, § 340.
- in divorce, court may make orders respecting parties and property, § 340.
- answer in divorce cases, § 343.
- quantum* of proof required in divorce, § 347.
- parties to divorce suits may testify, § 349.
- children not made illegitimate by divorce, § 352.
- either party to divorce may marry again, § 352.
- court may change name of party to divorce, § 352.
- decree of divorce, § 352.
- decree of divorce may settle property rights of parties, § 353.
- forbidding divestiture of title to real estate in divorce, § 356.
- allowing alimony, § 357.
- costs in divorce, § 358.
- custody of children, § 359.
- descent of property, § 363.
- death of adopted heir, descent of property, § 363.
- descent of community property, § 364.
- community descends charged with debts, § 364.
- children born before marriage inherit, § 364.
- descent of homestead, § 365.
- partition of homestead, § 365.
- homestead rights same whether separate or community property, § 365.
- administration, §§ 366, 381.
- survivor may renounce right to administration, § 366.
- revoking letters in favor of one having preference, § 366.
- allowance for support of widow and minor children, § 367.
- setting apart homestead and other exemptions and allowances in lieu, § 371.
- administration of community, § 375.
- administrator not entitled to exemptions, § 381.
- homestead liable for certain debts, §§ 371, 373, 382.
- remarriage of widow, §§ 375, 387, 400.
- partition of community from separate estate of deceased, § 391.

STATUTE OF FRAUDS.

- parol evidence admissible to establish resulting trusts, § 241.
- contract to marry, § 2.
- release by heir, § 63.
- partition of law, § 63.
- agreements concerning boundaries, § 65.

STATUTE OF FRAUDS—continued.

dedication of wife's land, § 78.

wife's conveyance of personal property, § 118.

wife's parol agreement to sell homestead, § 261.

See also WRITING.

TEALING.

wife's property by husband, § 38.

TACKHOLDER.

wife as, § 77.

TACKS.

certificates, see NOTES.

TACK.

from wife's land, §§ 189, 221.

TACKHOUSE.

homestead, when, § 253.

TACKROGATION.

wife's right to, § 75.

of one furnishing money to discharge lien on homestead, § 265.

TACKFRAGE.

women not entitled to, § 33.

TACKS.

by guardian of insane husband, §§ 31, 292.

husband can make no agreement in, concerning wife's property or homestead, §§ 37, 280, 322.

against husband to recover wife's counsel fees, § 66.

to correct defective certificate, § 110.

whether permitted to impeach certificate, § 113.

of wife at common law, §§ 153, 291.

wife may make compromise, §§ 63, 280, 322.

by and against married women generally, §§ 280, 283.

wife may appear in her individual capacity in, §§ 281, 293.

wife's, against husband, §§ 283, 284.

wife as a plaintiff generally, § 284.

to recover wife's separate property, §§ 284, 325.

wife's, where husband abandons her, § 284.

wife improper party with husband in his suits, § 284.

instituted by wife *dum sola* not abated by marriage, §§ 285, 296.

not abated by death of husband, when, § 286.

parties, where husband and wife live apart, § 286.

for recovery of community property, §§ 287, 321.

by wife concerning community property, §§ 287-298.

SUITS—continued.

- husband manages the community, § 287.
- parties to, in action for damages for death of child, § 288.
- parties to, in action against liquor dealer, § 289.
- parties to, in action against railway companies for penalty, § 289.
- concerning the homestead, parties, §§ 290, 295, 321.
- husband's, in behalf of wife, binds her, §§ 286, 290, 321.
- by wife for alienation of husband's affections, § 291.
- wife's, when husband insane, § 292.
- by guardian of insane husband, § 292.
- by husband where wife insane, § 292.
- husband where he is a minor, § 292.
- wife as defendant, generally, § 293.
- husband cannot defend wife's, §§ 293, 321.
- citation to wife, service of, § 293.
- against wife, venue, §§ 293, 296.
- against husband and wife jointly, when, §§ 294, 296.
- dismissing as to husband, § 296.
- against wife where husband absent, § 296.
- on contract signed by wife, parties, § 297.
- against husband, wife unnecessary party, § 297.
- by wife, her pleadings, § 298.
- by husband for wife, his pleadings, § 299.
- against wife, her liability must be alleged, § 300.
- limitations, see LIMITATIONS.
- concerning wife's separate property, limitations discussed, § 311.
- judgments against married women, §§ 315-317.
- judgment where wife as sole plaintiff recovers, § 317.
- judgment where husband and wife recover, § 317.
- foreclosure against wife, judgment, § 320.
- costs, § 320.
- execution, § 323.
- divorce, effect of, on pending, § 325.
- death of husband pending, § 325.
- by survivor, §§ 325, 383, 398.
- for divorce, see DIVORCE.
- for partition between divorced couple, § 354.
- for exemptions and allowances, in district court, § 374.
- against qualified survivor, §§ 375, 383.
- by survivor in community, § 383.
- against survivor, no administration, § 398.
- suing surviving husband, on deceased wife's debt, § 398.
- minor children as parties to, by survivor, § 399.
- remarriage of widow, § 400.

See also ACTIONS; PARTIES; PLEADINGS.

SUPPORT.

- husband must, wife, §§ 29, 51.
- statute, §§ 29, 226, 284.

SUPPORT—continued.

- wife may forfeit right of, § 29.
- wife not liable for, of husband, §§ 58, 357.
- of family, when husband insane, §§ 103, 166.
- where husband has abandoned wife, § 105.
- of insane spouse, §§ 166, 167, 234.
- of child by parent, § 167.
- increase and fruits of wife's separate property liable for, of family, § 210.
- separate property liable for, of insane consort, § 234.
- wife cannot sue husband for, § 283.
- alimony, § 357.
- allowance for, of widow, etc., statute, § 367.

SURETY.

- wife as, §§ 75, 123.
- released, when, §§ 75, 312.
- extension to wife's principal, § 75.
- on bonds, § 76.
- husband not liable as wife's, unless, § 76.
- right to exhaust property of principal, § 75.

SURVIVOR.

- rights in the homestead not affected by will, § 159.
- may not testify as to transactions with deceased, when, § 304.
- rights as heir of deceased consort, § 363.
- rights in homestead, §§ 365, 371, 373, 379, 381.
- abandoning homestead, §§ 365, 371, 373, 374, 381.
- under twenty-one years, §§ 76, 366.
- may renounce right to administer, § 366.
- rights of, not defeated by act of deceased, § 372.
- may waive her rights, §§ 372, 373.
- cannot sell interest of children in the exemptions and allowances, § 372.
- converting children's portion of exemptions, § 372.
- and other beneficiaries not chargeable with use of exemptions, § 373.
- owning homestead, § 373.
- may have forfeited rights, §§ 374, 381.
- may establish rights in district court, when, § 374.
- powers of, when qualified, §§ 375-378, 380.
- account of, with community estate, §§ 375, 378, 387.
- to pay debts, etc., §§ 375, 377.
- compelling exhibit by, §§ 375, 383.
- citation to, on debt, when, §§ 375, 383.
- suing on bond of, §§ 375, 383, 384.
- if wife, same rights as husband, §§ 375, 381.
- remarriage of widow, §§ 375, 387, 400.
- nature of holding, §§ 376, 381.
- may contract concerning estate, when, § 376.

M. W.—36.

SURVIVOR—continued.

- sales by, §§ 378, 381, 384, 387.
- sales by, through agent, § 378.
- mortgage by, §§ 378, 381.
- rights in exemptions of community, §§ 379, 380.
- sales by, of homestead, §§ 381, 384, 392-394.
- suits by, and against, §§ 383, 384, 398.
- judgment against execution, §§ 383, 384, 387.
- individual liability of, §§ 384, 390, 398, 399.
- conversion by, § 384.
- may not seek his own discharge, § 387.
- chargeable with profits and gains, etc., §§ 375, 387.
- powers cease upon recovery of sanity of insane spouse, § 387.

SURVIVOR WITHOUT ADMINISTRATION.

- need not apply for administration, when, § 388.
- nature of holding, § 389.
- takes community when, § 389.
- entitled to reasonable expense, §§ 389, 397.
- cannot use estate for private gain, § 389.
- cannot sell or encumber children's interest, §§ 389, 392, 397.
- entitled to estate rent free, § 389.
- cotenants with children, when, §§ 389, 396.
- comparative rights of, and administrator of deceased spouse, §§ 390, 391.
- sales by, §§ 390, 392-394, 397.
- may have a partition of community from estate of deceased, § 391.
- can mortgage or sell his own interest, § 392.
- cannot dispose of children's portion even for necessities for them, § 392.
- paying debts, §§ 378, 392-394, 395, 397, 398, 400.
- conveyances by, §§ 392, 400.
- purchaser from, must show authority for sale, §§ 393, 395, 400.
- presumption of authority, when, §§ 392, 393.
- carrying out contracts made during the marriage, § 394..
- bonds for title executed during marriage, § 394.
- purchases from, if in good faith, § 395.
- equities between children, survivors, and purchasers, §§ 395, 397.
- separate property of, § 396.
- may sell or mortgage his property, even the homestead, § 396.
- suits by and against, § 398.
- suits by and against, minor children as parties, § 399.
- of common-law marriages, suits, § 399.
- individual liability, §§ 384, 390, 398, 399.
- remarriage of widow, §§ 375, 387, 400.
- can neither sue nor be sued as, after remarriage, § 400.

TAXES.

- wife's property liable for her, § 234.

TAXES—continued.

suit to foreclose lien on homestead, parties, § 295.
due on homestead, §§ 267, 373.

TEACH.

See EARNINGS.

TENANTS IN COMMON.

nature of holding, discussed, § 64.
husband and wife are, when, §§ 204, 324.
divorced parties are, when, §§ 324, 354.
in homestead, when, § 355.
children and survivor are, when, §§ 363, 381, 396.
one cotenant cannot charge others, when, § 363.

TESTAMENTARY LAW.

See WILLS.

TESTIFY.

See EVIDENCE.

THEFT.

of wife's property by husband, § 38.

TIMBER.

from wife's land may be community or separate, §§ 189, 221.

TITLE.

husband's deed to wife passes his, § 82.
wife's, to her property and homestead will pass only upon compliance
with statute, § 131.
wife's, to community, whether legal or equitable, § 175.

TOOLS, APPARATUS, AND BOOKS.

exempt, § 273.

TORTS.

of married women, generally, § 153.
liability of wife's property for her, §§ 59, 234.
husband's liability for wife's, § 153.
husband's inflicted on wife, §§ 155, 283.
husband gives the community no cause of action, but may to wife, §§
155, 196.

TRADE.

See MERCHANT.

WIFE—continued.

- domicil follows husband, § 28.
- no right to support away from home, when, § 29.
- her rights and capacities when abandoned, §§ 31, 50, 105.
- as a creditor of husband, § 38.
- her assent to husband's disposition of her property, § 39.
- accepting proceeds of illegal sale of her property, §§ 42, 152.
- bound by lawful act of husband as her representative, § 42.
- cannot bind herself by contract, generally, §§ 45, 46.
- as husband's agent, §§ 49, 50.
- is judge of what articles are "necessaries," § 56.
- accepting and using articles purchased by husband, whether liable therefor, § 57.
- not authorized to collect husband's debts, § 67.
- her liability for unpaid purchase money, § 70.
- cannot recover money paid by her on contracts, § 71.
- as surety, § 75.
- her conveyances to husband, §§ 86, 87.
- as creditor of husband, §§ 88, 145, 283.
- can seldom be husband's debtor, § 88.
- paying husband's draft, §§ 88, 239.
- conduct of, as creating an estoppel, §§ 129-133.
- bound by the judgment of a court, when, §§ 139, 319.
- as a merchant, § 140.
- as a partner in trade, §§ 141, 142, 300.
- her purchase with borrowed money, § 143.
- her liability for her torts, §§ 153, 293.
- her liability for agent's torts, § 154.
- her crimes, § 156.
- her interest in community property, § 171.
- cannot alien her interest in community, § 174.
- extent of her interest in community property, § 176.
- does not forfeit her rights by abandoning husband, § 177.
- personal earnings of, community, § 186.
- her insurance policy, § 195.
- antenuptial debts of, §§ 50, 203
- may convey her property in trust for her own benefit, §§ 225, 238.
- may, with consent of husband, exchange her property, sell, or invest, etc., § 231.
- trust in favor of, lasts during life of husband, § 237.
- may assert her resulting trust, when, § 239.
- nature of her interest in homestead, §§ 245, 259.
- nature of her interest in business homestead, § 253.
- refusing to move to husband's domicil, § 271.
- absence of, from husband and home, homestead, § 272.
- no peculiar or special right in personal exemptions, § 273.
- may sue or be sued, § 280.
- may make compromise, § 280.

WIFE—continued.

- obtaining permission of court to sue, § 281.
- a proper juristic person, §§ 281, 293, 315.
- suing husband, § 283.
- as a plaintiff generally, § 284.
- cannot bring suit for community, generally, § 287.
- may sue for community, when, § 287.
- actions by, for damages for death of child, § 288.
- actions by, for penalty against liquor dealer, § 289.
- may sue to recover homestead, § 290.
- may sue for alienation of husband's affections, § 291.
- her suits where husband insane, § 292.
- insane, husband's suits, § 292.
- as a defendant, generally, § 293.
- service of citation on, § 293.
- may waive citation, § 293.
- may be sued in county of husband's residence, § 293.
- proper and necessary defendant, when, § 294.
- could not testify where husband a party at common law, § 302.
- as a witness where husband a party, present rule, § 303.
- as witness for or against husband, § 305.
- may be compelled to testify against husband, when, § 305.
- validity of general judgment against, §§ 315-317.
- foreclosure against, judgment, § 320.
- bound by judgment against husband, when, § 321.

See also HUSBAND AND WIFE; MARRIED WOMEN.

WIFE'S CONTRACTS.

- at common law, § 21.
- of agency, § 32.
- concerning her separate property, §§ 37, 60.
- at common law, § 43.
- with us prior to 1840, § 44.
- with her husband, discussed, §§ 49, 283.
- binding on husband, when, §§ 50, 52-55.
- antenuptial, § 50.
- after divorce, § 50.
- for work upon homestead, § 50.
- leasing dwelling, §§ 50, 54.
- for necessities, §§ 51, 54.
- purchasing dwelling, § 54.
- binding on herself, when, § 56.
- to bind her must be made personally, § 57.
- to purchase property is not one made for "benefit of" such property,
§ 60.
- for "benefit of" her separate property, whether husband liable, § 61.
- for attorney's services, §§ 66, 280.
- for partition of her lands, § 64.

to sell homestead. §§ 122, 261.
for improvements, liens. § 124.
to purchase on credit. § 142.
to make mutual wills. § 161.
for improvements on homestead. § 264.
of compromise of law suits. § 280.
new promise to stop limitations. § 312.
to pay barred debt. § 312.

WIFE'S POWERS.

may transfer her note with husband's consent. § 62.
may release cause of action. §§ 63, 186.
may make contract of partition. § 64.
may agree concerning her boundary lines. § 65.
may employ counsel. §§ 66, 293.
cannot collect husband's debts. § 67.
cannot indorse his notes or sell his goods. § 67.
may contract for the purchase of land. § 69.
to contract to convey. § 74.
to contract as surety. § 75.
as stockholder. § 77.
may dedicate property to public use. § 78.
to contract for security. § 80.
to dispose of her property, generally. §§ 98, 99, 103, 121, 210.
distinction between power to convey and to contract. § 99.
when alienated by husband. §§ 29, 31, 50, 105.
when husband confined in penitentiary. §§ 105, 292.
to void her defective conveyance. § 113.
to convey her separate property, generally. §§ 115, 210.
to bind herself by estoppel. § 126.
to bind herself by mortgage. §§ 128, 222.

WILLS.

- of slaves, § 5.
- election by wife, estoppel, § 137.
- wife's, at common law, § 157.
- statutes, § 158.
- the doctrine of forced heirship, § 159.
- property that wife may will, § 159.
- construction of, §§ 160, 163.
- husband's will of community property, § 160.
- joint wills, § 161.
- election by widow, § 162.
- how revoked, § 163.

WITNESS.

- slaves as, § 5.
- must be two of every matrimonial agreement, § 274.
- wife not competent, when, § 287.
- husband and wife at common law, § 302.
- rule excluding party, superseded, §§ 302, 303.
- extent of old rule forbidding parties to testify, § 302.
- confidential communications, § 303.
- wife may not be asked touching questions tending to degrade her, § 303.
- wife as, in criminal cases, § 305.
- parties to divorce, § 349.
- particeps criminis* in divorce, § 351.
- wife as against husband generally, § 305.
- cross-examination of wife, § 305.
- wife as, against husband's accomplice, § 305.
- rule excluding testimony of husband or wife applies only to lawful marriages, § 305.
- second wife may testify against husband on charge of bigamy, § 306.
- husband or wife in criminal cases after divorce, §§ 305, 324.

WOOL.

- from wife's sheep, community, § 185.

WORK OXEN.

- two yoke, exempt, § 273.

WRITING.

- contract to marry need not be in, § 2.
- release as heir of estate, § 63.
- partition of land, § 63.
- agreements concerning boundary lines, § 65.
- dedication of wife's lands, § 78.
- wife's conveyances of personal property, § 118.
- mechanics' liens on homestead, § 263.

See also STATUTE OF FRAUDS.















